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Citation: **223 F.3d 1351, at 1356**

*223 F.3d 1351, \*; 2000 U.S. App. LEXIS 20963, \*\*;  
55 U.S.P.Q.2D (BNA) 1835*

KCJ CORPORATION, Plaintiff-Appellant, v. KINETIC CONCEPTS, INC. and  
KCI THERAPEUTIC SERVICES, INC., Defendants-Appellees.

99-1248

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

~~223 F.3d 1351; 2000 U.S. App. LEXIS 20963; 55 U.S.P.Q.2D (BNA) 1835~~

August 18, 2000, Decided

**PRIOR HISTORY:** **[\*\*1]** Appealed from: U.S. District Court for the  
District of Kansas. Judge Kathryn H. Vratil.

**DISPOSITION:** AFFIRMED.

### **CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant challenged judgment of  
United States District Court for the District of Kansas, which  
granted summary judgment to appellees in appellant's patent  
infringement action involving a therapeutic air mattress.

**OVERVIEW:** The trial court determined that appellant's patent  
claims for a therapeutic air mattress did not cover appellees'  
accused device, either literally or under the doctrine of  
equivalents. The trial court erred in construing one part of  
appellant's claim because it misread the article "a." Under the  
proper claim construction, appellees device that had three  
chambers would fall within the scope of one clause of appellant's  
claim, i.e., a device that has one or more continuous chambers.  
However, the error was harmless in light of the trial court's correct  
construction of the other clauses in appellant's claim. The trial  
court correctly granted appellees summary judgment of no literal  
infringement because appellees' accused device did not have  
uniform airflow in time and over the entire plan surface area.  
Appellees' devices did not infringe under the doctrine of  
equivalents because the prosecution history revealed that  
appellant had narrowed its patent claims to require spatial and

temporal uniformity to distinguish its patent from cited prior art. Appellant was therefore precluded from recapturing subject matter surrendered during prosecution through the doctrine of equivalents.

**OUTCOME:** Judgment affirmed because although trial court erred in construing one clause of appellant's claim, error was harmless in light of correct construction of claim's remaining clauses, appellees' device did not literally infringe on patented air mattress, and prosecution history of claim precluded use of doctrine of equivalents.

**CORE TERMS:** chamber, mattress, patent, airflow, air, continuous, secondary, upper, surface area, entirety, inflatable, written description, uniformity, apparatus, summary judgment, patient, embodiment, infringement, spatial, therethrough, continuously, compartment, top, air flow, temporal, singular, skin, air pressure, constructed, surface

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Patent Law > Infringement > Summary Judgment 

**HN1** The appellate court reviews without deference a district court's grant of summary judgment in a patent infringement claim. [More Like This Headnote](#)

Patent Law > Infringement > Summary Judgment 

**HN2** In the context of reviewing summary judgment in a patent infringement claim, whether the accused device contains each claim element exactly or its equivalent is a question of fact. [More Like This Headnote](#)

Patent Law > Infringement > Summary Judgment 

**HN3** In reviewing the district court's summary judgment in favor of one party in a patent infringement claim, the appellate court draws all reasonable inferences from the evidence in favor of the non-movant. [More Like This Headnote](#)

Patent Law > Infringement > Claim Interpretation 

**HN4** A patent infringement analysis involves two steps, claim construction and application of the properly construed claim to the accused product. The first step, claim construction, is a matter of law that the appellate court reviews without deference. The central focus of the infringement inquiry remains on the claim language, as illuminated by the written description and the prosecution history. [More Like This Headnote](#)

Patent Law > Infringement > Claim Interpretation 

**HN5** In the context of a patent infringement claim, the claim language itself governs claim scope. An indefinite article "a" or "an" in patent parlance carries the meaning of one or more in open-ended claims containing the transitional phrase comprising. Unless the claim is specific as to the number of elements, the article "a" receives a singular interpretation only in rare circumstances when the patentee evinces a clear intent to so limit the article. Under this conventional rule, the claim limitation "a," without more, requires at least one. [More Like This Headnote](#)

Patent Law > Infringement > Claim Interpretation 

**HN6** In the context of a patent infringement claim, prosecution history also may assist claim interpretation. Indeed, prosecution history limits the interpretation of claims so as to exclude any interpretation that may have been disclaimed or disavowed during prosecution in order to obtain claim allowance. Accordingly, an applicant may disclaim before the United States Patent and Trademark Office a plural interpretation and thus lose the benefit of the customary meaning of indefinite articles in patent claims. [More Like This Headnote](#)

Patent Law > Infringement > Claim Interpretation 

**HN7** In the context of a patent infringement claim, when claim language or context suggests an ambiguity in application of the general meaning of an article, the court undertakes an examination of the written description and the prosecution history to ascertain whether to limit the meaning of "a" or "an." [More Like This Headnote](#)

Patent Law > Infringement > Claim Interpretation 

**HN8** Literal infringement of a patent claim occurs when every limitation recited in the claim appears in the accused device, i.e., when the properly construed claim reads on the accused device exactly. [More Like This Headnote](#)

Patent Law > Infringement > Doctrine of Equivalents 

**HN9** Infringement under the doctrine of equivalents requires that the accused product contain each limitation of the claim or its equivalent. An element in the accused product is equivalent to a claim limitation if the differences between the two are insubstantial to one of ordinary skill in the art. However, prosecution history estoppel prevents the application of the doctrine of equivalents as a tool to recapture subject matter

surrendered during prosecution. Application of the rule precluding use of the doctrine of equivalents to recapture claim scope surrendered during patent acquisition is a question of law subject to review without deference. [More Like This Headnote](#)

**COUNSEL:** Stacy Y. Daniels, Spencer Fane Britt & Browne LLP, of Kansas City, Missouri, argued for plaintiff-appellant. With her on the brief were Michael F. Saunders, Teresa A. Woody, and Therese M. Schuele.

Lawrence A. Rouse, Rouse Hendricks German May PC, of Kansas City, Missouri, argued for defendants-appellees. With him on the brief were Kirk T. May and David J. Rempel. Of counsel were Marcus Neil Bozeman and Vivian Williams McLeod.

**JUDGES:** Before PLAGER, CLEVENGER, and RADER, Circuit Judges.

**OPINIONBY:** RADER

**OPINION:** [\*1353]

RADER, Circuit Judge.

On summary judgment, the United States District Court for the District of Kansas ruled that Kinetic Concepts, Inc. and KCI Therapeutic Services, Inc. (collectively, Kinetic) did not infringe KCJ Corporation's (KCJ's) U.S. Patent No. 4,631,767 ( '767 patent). See KCJ Corp. v. Kinetic Concepts, Inc., 39 F. Supp. 2d 1286 (D. Kan. 1999) (KCJ II). Because the district court correctly concluded as a matter of law that the claims at issue cannot cover the accused device, either literally or under the doctrine of equivalents, this court **[\*\*2]** affirms.

I.

KCJ is the assignee of the '767 patent entitled "Air Flotation Mattress." The patent claims therapeutic mattresses for preventing bedsores. These mattresses, according to the patent, "evenly distribute[] the weight of the body without the necessity of internal spines or other patient-contacting solid supports . . . [and] permit airflow to all areas of the skin to absorb moisture and prevent heat accumulation." '767 patent, col. 2, ll. 31-35. Claim 1, the only independent claim, recites (with bracketed notations added for ease of reference):

1. An air flotation, ventilated mattress apparatus comprising:

[(a)] means defining a lower, continuous, inflatable chamber

having an air-permeable, flexible upper wall portion,

[(b)] said upper wall portion being constructed for substantially uniform airflow therethrough over substantially the entire plan surface area of said upper wall portion;

[(c)] air-permeable secondary wall means above said chamber upper wall portion and operably coupled with said chamber-defining means,

[(d)] said secondary wall means being constructed for substantially uniform passage of air therethrough over **[(\*\*3)]** substantially the entire plan surface area of said secondary wall means,

[(e)] said secondary wall means and upper wall cooperatively defining therebetween an inflatable compartment above said chamber; and

[(f)] means for continuously introducing positive pressure air into said chamber in order to continuously maintain positive air pressure conditions throughout the entirety of said chamber during the entirety of operation of said mattress apparatus and to inflate both said chamber and compartment by passage of said air into said chamber and thence through said upper wall portion and thereby maintain positive air pressure conditions in said compartment, and to cause said continuous passage of air through said secondary wall means,

[(g)] said mattress apparatus being free of solid internal support structure for supporting a patient,

[(h)] said air introduction means, upper wall portion and secondary wall means being cooperatively configured and arranged for continuous passage of sufficient positive pressure airflow through the chamber, upper wall portion, compartment, and secondary wall means for even, substantially uniform flow of air from said **[(\*\*4)]** mattress apparatus so that a person lying atop the secondary wall means is supported by said pressurized air without the presence of weight-supporting structure within said mattress apparatus.

Id. at col. 6, ll. 8-49 (emphasis added). As shown below, Figures 2 and 3

illustrate an embodiment of the invention: **[\*1354]**

[SEE FIGURES 2 AND 3 IN ORIGINAL]

Figure 2 is a perspective view of the mattress with a portion of the upper secondary wall folded back to reveal the upper wall. Figure 3 is a side sectional view of the mattress 16 with a top wall 26. The bottom, side, and top walls 22, 24, and 26 define a lower inflatable chamber 34. See *id.* at col. 4, ll. 20-22. Bottom wall 22 and side walls 24 are substantially impervious to airflow while the top wall 26 is pervious. See *id.* at col. 4, ll. 25-29. "Mattress 16 is devoid of any internal solid patient supports which could present areas of pressure contact to a patient lying on the mattress." *Id.* at col. 4, ll. 47-50.

During prosecution of the '767 patent application in the U.S. Patent and Trademark Office (PTO), the examiner rejected the claims under 35 U.S.C. § 103 (1994) as obvious over Schild **[\*\*5]** et al., U.S. Patent No. 4,391,009, in view of Gammons et al., U.S. Patent No. 4,347,633. In response, the patentee amended claim 1 to add, inter alia, the "continuous" limitation in clause (a) and limitations that issued as clauses (b) and (d). The examiner then allowed the claims of the '767 patent.

Kinetic makes and sells low-air-loss mattresses. Kinetic's mattresses prevent skin breakdown by reducing the interface pressure between the skin of a bedridden patient and the support device. These accused devices include an inflatable mattress, an air supply unit, and a removable cover sheet. Each inflatable mattress is a one-piece unit consisting of three separately inflatable sections for the head, body, and legs of the patient. **[\*1355]**

In 1997, KCJ sued Kinetic, alleging infringement of the '767 patent. On December 17, 1998, the district court held a hearing to construe claim 1 of the '767 patent. See *KCJ Corp. v. Kinetic Concepts, Inc.*, 30 F. Supp. 2d 1319 (D. Kan. 1998) (KCJ I). Specifically, the district court construed "a lower, continuous, inflatable chamber" limitation of clause (a) as follows: "A person of ordinary skill in the art of air bed engineering **[\*\*6]** would read the phrase 'continuous' to mean without interruption and the word 'a' to mean one." *Id.* at 1325. The court, therefore, determined that "a . . . continuous . . . chamber" means "one non-interrupted inflatable chamber." *Id.*

As to clauses (b) and (d), the district court determined:

"A person of ordinary skill in the art of air bed engineering would read 'substantially uniform airflow' to mean airflow that does not substantially fluctuate over time. When added to the

words 'over substantially the entire plan surface,' the claim requires [an] air flow at substantially the same rate at substantially all locations on the surface."

Id. at 1326.

After construing the claim, the district court granted Kinetic's motion for summary judgment of noninfringement. See KCJ II. Adopting the claim construction of KCJ I, the district court determined that the accused devices do not literally infringe claim 1 because "[KCJ] concedes that the limitations of Clause (a) and Clause (b) are not met by any of the accused devices." 39 F. Supp. 2d at 1289 n.2. The district court further held as a matter of law that prosecution history estoppel **[\*\*7]** barred a finding of infringement under the doctrine of equivalents. KCJ appeals.

II.

**HN1** This court reviews without deference a district court's grant of summary judgment. See Cortland Line Co. v. Orvis Co., 203 F.3d 1351, 1355, 53 U.S.P.Q.2D (BNA) 1734, 1746 (Fed. Cir. 2000). **HN2** Whether the accused device contains each claim element exactly or its equivalent is a question of fact. See Southwall Techs., Inc. v. Cardinal IG Co., 54 F.3d 1570, 1575, 34 U.S.P.Q.2D (BNA) 1673, 1676 (Fed. Cir. 1995). **HN3** In reviewing the district court's summary judgment in favor of Kinetic, this court draws all reasonable inferences from the evidence in favor of the non-movant, KCJ. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

**HN4** A patent infringement analysis involves two steps: claim construction and application of the properly construed claim to the accused product. See Markman v. Westview Instruments, Inc., 52 F.3d 967, 976, 34 U.S.P.Q.2D (BNA) 1321, 1326 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996). The first step, claim construction, is a matter of law that **[\*\*8]** this court reviews without deference. See Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1454, 46 U.S.P.Q.2D (BNA) 1169, 1172 (Fed. Cir. 1998) (en banc). The central focus of the infringement inquiry remains on the claim language, as illuminated by the written description and the prosecution history. See Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1309, 51 U.S.P.Q.2D (BNA) 1161, 1169 (Fed. Cir. 1999); Vitronics Corp. v. Conceptoronic, Inc., 90 F.3d 1576, 1582, 39 U.S.P.Q.2D (BNA) 1573, 1576-77 (Fed. Cir. 1996).

A.

The disputed claim construction on appeal involves limitations of clauses (a), (b), and (d). Clause (a) requires "a . . . continuous . . . chamber." At the heart of the dispute over this limitation is the meaning of the article "a." Specifically, does the article limit the number of chambers to only one or does it cover one or more chambers?

The district court limited clause (a) to only one non-interrupted inflatable chamber. The district court stated that "the concept of multiple chambers is at fundamental odds with the concept of continuity, [\*1356] and discrete multiple chambers cannot be read into the patent without sacrificing the concept [\*\*9] of continuity." KCJ I, 30 F. Supp. 2d at 1325. Thus, the district court "had little hesitation in concluding that [the claim] means exactly what it says: one continuous chamber." *Id.* Based on that construction, the district court held as a matter of law that clause (a) of claim 1 does not read on Kinetic's accused devices having multiple continuous chambers.

As noted before, <sup>HN5</sup> the claim language itself governs claim scope. See *Vitronics*, 90 F.3d at 1582. This court has repeatedly emphasized that an indefinite article "a" or "an" in patent parlance carries the meaning of "one or more" in open-ended claims containing the transitional phrase "comprising." See *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 977, 52 U.S.P.Q.2D (BNA) 1109, 1112 (Fed. Cir. 1999); *AbTox, Inc. v. Exitron Corp.*, 122 F.3d 1019, 1023, 43 U.S.P.Q.2D (BNA) 1545, 1548 (Fed. Cir. 1997); *North Am. Vaccine, Inc. v. American Cyanamid Co.*, 7 F.3d 1571, 1575-76, 28 U.S.P.Q.2D (BNA) 1333, 1336 (Fed. Cir. 1993); see also Robert C. Faber, *Landis on Mechanics of Patent Claim Drafting* 531 (3d ed. 1990). Unless the claim is specific as to the number of elements, [\*\*10] the article "a" receives a singular interpretation only in rare circumstances when the patentee evinces a clear intent to so limit the article. See *AbTox*, 122 F.3d at 1023, 43 U.S.P.Q.2D (BNA) at 1548. Under this conventional rule, the claim limitation "a," without more, requires at least one.

This court has encountered "a" or "an" in patent claims on several occasions. This court has uniformly applied the general rule for indefinite articles. For instance, in *AbTox*, this court applied the rule and amplified: "The written description supplies additional context for understanding whether the claim language limits the patent scope to a single unitary [element] or extends to encompass a device with multiple [elements]." *Id.* at 1024, 43 U.S.P.Q.2D (BNA) at 1548. Moreover, standing alone, a disclosure of a preferred or exemplary embodiment encompassing a singular element does not disclaim a plural embodiment. "Although the specifications may well indicate that certain embodiments are preferred, particular embodiments appearing in a specification will not be read into

the claims when the claim language is broader than such embodiments." Electro Med. Sys., S.A. v. Cooper Life Sciences, Inc., 34 F.3d 1048, 1054, 32 U.S.P.Q.2D (BNA) 1017, 1021 (Fed. Cir. 1994). **[\*\*11]** Thus, as the rule dictates, when the claim language or context calls for further inquiry, this court consults the written description for a clear intent to limit the invention to a singular embodiment.

**HN6** Prosecution history also may assist claim interpretation. Indeed, prosecution history "limits the interpretation of claims so as to exclude any interpretation that may have been disclaimed or disavowed during prosecution in order to obtain claim allowance." Standard Oil Co. v. American Cyanamid Co., 774 F.2d 448, 452, 227 U.S.P.Q. (BNA) 293, 296 (Fed. Cir. 1985). Accordingly, an applicant may disclaim before the PTO a plural interpretation and thus lose the benefit of the customary meaning of indefinite articles in patent claims. See Alpex Computer Corp. v. Nintendo Co., 102 F.3d 1214, 1220-21, 40 U.S.P.Q.2D (BNA) 1667, 1671-72 (Fed. Cir. 1996).

Accordingly, **HN7** when claim language or context suggests an ambiguity in application of the general meaning of an article, this court undertakes an examination of the written description and the prosecution history to ascertain whether to limit the meaning of "a" or "an." For example, in Insituform Technologies, Inc. v. CAT Contracting, Inc., 99 F.3d 1098, 1106, 40 U.S.P.Q.2D (BNA) 1602, 1608 (Fed. Cir. 1996), **[\*\*12]** the claim language itself belied a singular meaning. Thus, this court undertook an examination of the entire context of the language and held: "In light of the language found in the claims, specification and file history, we conclude the only correct and indeed the reasonable interpretation **[\*1357]** of claim 1 limits the scope of that claim to a process using only one vacuum cup which inherently creates a discontinuous vacuum." *Id.* In that case, the court restricted the claim to a singular interpretation because "the claim is specific as to the number of elements (one cup) and adding elements eliminates an inherent feature (discontinuous vacuum) of the claim." *Id.*

In the present case, neither the claim nor its context suggests an exceptional meaning for the article. The intrinsic evidence simply provides no support for departing from the general rule. At the outset, the claim language of clause (a), "a . . . continuous . . . chamber," does not specify the number of elements. Thus, under the general rules of claim construction, this court presumes the customary meaning of "a" - one or more. Furthermore, the written description does not trump that construction. Referring to Figure 3, **[\*\*13]** the written description of the '767 patent discloses that "the bottom, side and top walls 22, 24, and 26 cooperatively define a lower inflatable chamber broadly referred to by the numeral 34." '767 patent, col. 4, ll. 20-22. Chamber 34 is operatively

coupled to a secondary uppermost wall 36, which provides even airflow. See *id.* at col. 4, ll. 32-45. The written description at no point restricts the invention to only one chamber.

Similarly, the prosecution history of the '767 patent does not disclaim multiple chambers. Neither the amendment itself nor the accompanying remarks limits "a . . . continuous . . . chamber" to only a single chamber. Rather, the remarks focus on the details of the airflow, which passes through the entirety of the chamber during all operations of the mattress. Accordingly, in view of the use of an indefinite article "a" in the claim language without numerical qualifiers and the absence of disclaimers in the written description and the prosecution history, this court holds that "a . . . continuous . . . chamber" covers one or more continuous chambers.

Thus, under the proper claim construction, an accused device having one or more continuous chambers would **[\*\*14]** fall within the scope of clause (a). In the present case, undisputed evidence shows that Kinetic's accused devices have three chambers. Accordingly, this court concludes that clause (a) reads on Kinetic's accused devices. The district court's misreading of the article in this claim, however, is harmless error in light of the meaning of the other clauses.

B.

The district court construed clause (b) - an "upper wall portion being constructed for substantially uniform airflow therethrough over substantially the entire plan surface area of said upper wall portion" - and clause (d) - "secondary wall means being constructed for substantially uniform passage of air therethrough over substantially the entire plan surface area of said secondary wall means" - to require "air flow at substantially the same rate at substantially all locations on the surface." KCJ I, 30 F. Supp. 2d at 1326. The district court thus required uniformity of airflow both temporally and spatially.

This court thus examines whether clauses (b) and (d) require an airflow uniform both in time and space. During the trial court's proceedings, "the parties agreed that when the claim language refers to 'substantially **[\*\*15]** uniform passage of air,' it means airflow which is substantially steady, constant or continuous, as opposed to fluctuating intermittent or alternating over time. . . . [However,] they disagreed about where the patent claims the substantially steady air flow will occur." *Id.* at 1325-26. On appeal, KCJ maintains that the "continuous passage of air" requires uniform airflow only in a temporal sense. Specifically, KCJ asserts: "As used in clauses (b) and (d) of claim 1 of the '767 patent, 'substantially uniform airflow over substantially the entire plan surface area' means that wherever air comes through anywhere over the surface

area, it **[\*1358]** will flow at a substantially uniform or constant rate over time." This court, however, agrees with the district court that claim 1 requires uniformity in space as well as time.

First, the claim language itself requires spatial uniformity. Clause (b) requires "uniform airflow therethrough over substantially the entire plan surface area." '767 patent, col. 6, ll. 12-13 (emphasis added). Similarly, clause (d) requires "uniform passage of air therethrough over substantially the entire plan surface area." Id. at col. 6, **[\*\*16]** ll. 19-20 (emphasis added). As the district court aptly noted, "the claim demands that air flow through all locations on the surfaces." KCJ I, 30 F. Supp. 2d at 1326. To limit uniformity to temporal aspects would render these limitations meaningless.

The written description of the '767 patent reinforces the essential nature of spatial uniformity. The present invention is an "air floatation mattress . . . supporting a recumbent patient entirely by means of a throttled flow of pressurized air which also ventilates and cools all adjacent areas of the patient's skin." '767 patent, col. 2, ll. 41-45. To enable the mattress to "continuously ventilate all areas of the skin adjacent the mattress," there must be airflow over the entire plan surface area as the claim recites. Id. at col. 3, ll. 4-5. In fact, the written description explains:

Pressurized air passes evenly through virtually the entire plan surface area of the top wall 26. As a consequence, such air also serves to inflate the upper compartment 40 between top wall 26 and secondary wall 36. Such pressurized air then flows evenly through the suede or leather secondary wall 36; here again, this airflow **[\*\*17]** is substantially even over substantially the entire plan surface area of the wall 36.

Id. at col. 5, ll. 18-25 (emphasis added). Unless the air mattress has uniform airflow over substantially the entire plan surface area, a patient lying on the secondary wall would not be "supported entirely by the inflatable compartment and chamber without the necessity of spines or other internal, non-inflatable solid support structure within or forming a part of the mattress apparatus." Id. at col. 2, ll. 63-66 (emphasis added).

The record of the administrative proceedings before the PTO supports this interpretation of claim 1. In seeking allowance of the pending claims, the patentee added clauses (b) and (d) to claim 1 and remarked:

In no way does the alternating pad of the Schild et al. reference supply positive pressure air throughout the entirety of the chamber during all operations of the mattress. . . .

Moreover, Gammons et al. does not provide means for continuously maintaining positive air pressure conditions throughout the entirety of the lower chamber during the entirety of the operation of the mattress apparatus.

J.A. at 138-39 (emphasis **[\*\*18]** added). The express statements of the patentee clarify that the airflow limitations require both a temporal and spatial uniformity. In sum, the prosecution history also supports the district court's interpretation of clauses (b) and (d). To read the claim otherwise would ignore express language of the claim requiring airflow "over substantially the entire plan surface area." '767 patent, col. 6, ll. 14-15.

The district court determined that clauses (b) and (d), when properly construed, do not read on Kinetic's accused mattresses. **HN8** Literal infringement of a claim occurs when every limitation recited in the claim appears in the accused device, i.e., when "the properly construed claim reads on the accused device exactly." Amhil Enters., Ltd. v. Wawa, Inc., 81 F.3d 1554, 1562, 38 U.S.P.Q.2D (BNA) 1471, 1476 (Fed. Cir. 1996). The district court construed clauses (b) and (d) to require uniform airflow in time and over the entire plan surface area. KCJ conceded that under the district court's construction, which this court upholds, "limitations of . . . Clause (b) are not met by any of the accused **[\*1359]** devices." KCJ II, 39 F. Supp. 2d at 1289 n.2. Accordingly, this court **[\*\*19]** affirms the district court's grant of summary judgment of no literal infringement.

### III.

The district court also properly held on summary judgment that Kinetic's devices do not infringe under the doctrine of equivalents. **HN9** Infringement under the doctrine of equivalents requires that the accused product contain each limitation of the claim or its equivalent. See Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 40, 41 U.S.P.Q.2D (BNA) 1865, 1875, 137 L. Ed. 2d 146, 117 S. Ct. 1040 (1997). An element in the accused product is equivalent to a claim limitation if the differences between the two are "insubstantial" to one of ordinary skill in the art. See *id.* However, prosecution history estoppel prevents the application of the doctrine of equivalents as a tool to recapture subject matter surrendered during prosecution. See Litton Sys., Inc. v. Honeywell, Inc., 140 F.3d 1449, 1458, 46 U.S.P.Q.2D (BNA) 1321, 1327 (Fed. Cir. 1998). Application of the rule precluding use of the doctrine of equivalents to recapture claim scope surrendered during patent acquisition is a question of law subject to review without deference. See Mark I Mktg. Corp. v. R.R. Donnelley & Sons Co., 66 F.3d 285, 291, 36

U.S.P.Q.2D (BNA) 1095, 1100 (Fed. Cir. 1995). [\*\*20]

This court concludes that the prosecution history of the '767 patent supports the district court's refusal to apply the doctrine of equivalents. The prosecution history reveals that KCJ, in an attempt to obtain allowance of the pending claims over the cited prior art Schild et al. and Gammons et al., added clauses (b) and (d) in their entirety. Additionally, KCJ supplemented the claim amendment with the following remark:

Claim 1 as now amended specifically and unambiguously recites means for introduction of positive pressure air into the chamber in order to "continuously maintain positive air pressure conditions throughout the entirety of said chamber during the entirety of operation of said mattress apparatus . . . ." In no way does the alternating pad of the Schild et al. reference supply positive pressure air throughout the entirety of the chamber during all operations of the mattress.

. . . .

The Gammons et al. reference . . . is likewise very different from the structure as claimed in the present claims. . . . Gammons et al. does not employ a chamber having an upper wall which is constructed for substantially uniform air flow through substantially [\*\*21] the entire plan surface of the upper wall. Moreover, Gammons et al. does not provide means for continuously maintaining positive air pressure conditions throughout the entirety of the lower chamber during the entirety of the operation of the mattress apparatus.

J.A. at 138-39 (emphasis added). Following the claim amendment and the accompanying remarks, the examiner allowed the pending claims.

On appeal, KCJ argues that the amendment and the remarks should impose only a temporal uniformity because spatial uniformity would not distinguish the pending claims over the prior art. However, this court concludes that KCJ's statements reflect a clear and unmistakable surrender of mattresses without airflow "throughout the entirety of the lower chamber." Id. The added claim language as well as the accompanying remarks show that KCJ narrowed the claims to require spatial and temporal uniformity to obtain allowance of the pending claims. In fact, KCJ admits in its appeal brief that "KCJ added specific language, including the clauses at issue, for the express purpose of distinguishing the '767 patent from the cited prior art."

Accordingly, this court holds that the prosecution **[\*\*22]** history precludes KCJ from recapturing subject matter surrendered during prosecution through the doctrine of equivalents. As mentioned above, KCJ conceded that Kinetic's devices do not satisfy the spatial uniformity limitation. KCJ **[\*1360]** may not now employ the doctrine of equivalents to extend clauses (b) and (d) to encompass Kinetic's devices, which are not within the legal boundaries of claim 1. This court therefore affirms the district court's grant of summary judgment of noninfringement under the doctrine of equivalents.

## CONCLUSION

Because Kinetic's accused mattresses do not infringe claim 1 of the '767 patent, either literally or equivalently, this court affirms the district court's grant of summary judgment of noninfringement.

## COSTS

Each party shall bear its own costs.

AFFIRMED.






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*18 F. Supp. 2d 1212, \*; 1998 U.S. Dist. LEXIS 13808, \*\**

**KCJ CORPORATION**, Plaintiff, v. **KINETIC CONCEPTS, INC.**, et al.,  
Defendant.

CIVIL ACTION No. 98-2047-KHV

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

18 F. Supp. 2d 1212; 1998 U.S. Dist. LEXIS 13808

August 4, 1998, Decided  
August 4, 1998, Filed

**DISPOSITION:** **[\*\*1]** Defendants' Motion To Transfer Venue (Doc. # 47) filed March 25, 1998 overruled.

### CASE SUMMARY

**PROCEDURAL POSTURE:** Defendant alleged infringers filed a motion to transfer venue, pursuant to 28 U.S.C. § 1404, in plaintiff patent holder's patent infringement action.

**OVERVIEW:** The infringers were Texas corporations with principal places of business in San Antonio. The patent holder filed suit in the Western District of Missouri because of docket management policies and procedural rules that promoted prompt and cost effective disposition of cases in that district. Pursuant to § 1404(a), the infringers sought transfer to the Western District of Texas. The trial court initially granted the infringers' motion to transfer. Dissatisfied with that ruling, the patent holder filed a motion for partial reconsideration, seeking transfer to the District of Kansas. The District Court for the Western District of Missouri, treating the motion as a cross-motion to transfer venue, sustained it and transferred the case to the District of Kansas. The infringers then sought transfer to the Western District of Texas. The court overruled the infringers' motion, holding that the infringers did not demonstrate that the Western District of Missouri committed clear error in transferring the case to the court. Further, transferring the

case to Texas would only have shifted the infringers' inconvenience to the patent holder.


**OUTCOME:** The infringers' motion to transfer venue was overruled.

**CORE TERMS:** choice of forum, venue, reconsideration, deference, motion to transfer, cross-motion, transferring, shopping, mattress, transferred, personal jurisdiction, motion to reconsider, sound discretion, great weight, new evidence, filed suit, inconvenience, convenience, expeditious, economical, patent, shop, treating, partial


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**LexisNexis (TM) HEADNOTES - Core Concepts - ♦ [Hide Concepts](#)**

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Civil Procedure > Venue > Change of Venue in Federal Courts 

**HN1** Whether to transfer venue under 28 U.S.C.S. 1404, is within the sound discretion of the district court, and the party seeking the transfer has the burden of demonstrating that it is appropriate. The court may transfer a case to any district or division where it might have been brought for the convenience of parties and witnesses and in the interest of justice. 28 U.S.C.S. § 1404(a). The court should also consider the following factors: the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical. [More Like This Headnote](#)


Civil Procedure > Venue > Change of Venue in Federal Courts 

**HN2** The court must normally give great weight to plaintiff's choice of forum. Unless the balance is strongly in favor of the movant the plaintiff's choice of forum should rarely be disturbed. It is not sufficient for defendant to show that the claim arose elsewhere, nor will the court order transfer if the result is merely to shift the inconvenience from one party to the other. [More Like This Headnote](#)

Civil Procedure > Preclusion & Effect of Judgments > Law of the Case Doctrine

**HN3** The doctrine of law of the case posits that when a court

decides a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case. Traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court, including its transfer order. [More Like This Headnote](#)

[Civil Procedure](#) > [Relief From Judgment](#) > [Motions to Alter & Amend](#) 

**HN4** The court has discretion whether to grant or deny a motion for reconsideration. In exercising that discretion the court may recognize any one of three grounds justifying reconsideration: an intervening change in controlling law, availability of new evidence, and the need to correct clear error or prevent manifest injustice. [More Like This Headnote](#)

**COUNSEL:** For KCJ CORPORATION, plaintiff: Terry W. Schackmann, Therese M. Schuele, Michael F. Saunders, Teresa A. Woody, Spencer, Fane, Britt & Browne, Kansas City, MO.

For KCJ CORPORATION, plaintiff: Stacy Y Daniels, Spencer, Fane, Britt & Browne, Overland Park, KS.

For KINETIC CONCEPTS INC, KCI THERAPEUTIC SERVICES, INC., defendants: Lawrence A. Rouse, Marcus N. Bozeman, Vivian W. McLeod, Rouse, Hendricks, German, May & Shank, Kansas City, MO.

For DON P LOVETERE, movant: Lawrence A. Rouse, Marcus N. Bozeman, Vivian W. McLeod, Rouse, Hendricks, German, May & Shank, Kansas City, MO.

**JUDGES:** KATHRYN H. VRATIL, UNITED STATES DISTRICT JUDGE.

**OPINIONBY:** KATHRYN H. VRATIL

**OPINION: [\*1213] MEMORANDUM AND ORDER**

This matter comes before the Court on defendants' Motion To Transfer Venue (Doc. # 47) filed March 25, 1998.

**Legal Standards**

**HN1** Whether to transfer venue under 28 U.S.C. 1404 n1 is within the sound discretion of the district court, and the party seeking the transfer has the burden of demonstrating that it is appropriate. See Scheidt v. Klein, 956 F.2d 963, 965 (10th Cir. 1992). **[\*\*2]** The Court may transfer

a case to any district or division where it might have been brought  
[\*1214] for "the convenience of parties and witnesses" and "in the  
interest of justice." 28 U.S.C. § 1404(a). The Court should also consider  
the following factors: n2

the plaintiff's choice of forum; the accessibility of witnesses and  
other sources of proof, including the availability of compulsory  
process to insure attendance of witnesses; the cost of making  
the necessary proof; questions as to the enforceability of a  
judgment if one is obtained; relative advantages and obstacles  
to a fair trial; difficulties that may arise from congested  
dockets; the possibility of the existence of questions arising in  
the area of conflict of laws; the advantage of having a local  
court determine questions of local law; and, all other  
considerations of a practical nature that make a trial easy,  
expeditious and economical.

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516  
(10th Cir. 1991) (quoting Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145,  
147 (10th Cir. 1967)).

----- Footnotes -----

n1 The District Court for the Western District of Missouri held that  
defendants were subject to personal jurisdiction in Missouri and they do  
not dispute personal jurisdiction in Kansas. Hence, this motion to transfer  
venue is reviewed under 28 U.S.C. § 1404(a) rather than 28 U.S.C. §  
1406(a). **[\*\*3]**

n2 Many of these factors do not apply to the present case, which arises  
under federal law.

----- End Footnotes -----

**HN2** The Court must normally give great weight to plaintiff's choice of  
forum. See Allstate Ins. Co. v. Employers Reinsurance Corp., 715 F. Supp.  
1502, 1502 (D. Kan. 1989); Ammon v. Kaplow, 468 F. Supp. 1304, 1313  
(D. Kan. 1979). "Unless the balance is strongly in favor of the movant the  
plaintiff's choice of forum should rarely be disturbed." Scheidt, 956 F.2d at  
965 (quoting William A. Smith Contracting Co., Inc. v. Travelers Indem.

Co., 467 F.2d 662, 664 (10th Cir. 1972)). It is not sufficient for defendant to show that the claim arose elsewhere, see Headrick v. Atchison, Topeka & Sante Fe Ry. Co., 182 F.2d 305 (10th Cir. 1950), nor will the Court order transfer if the result is merely to shift the inconvenience from one party to the other. See Ammon, 468 F. Supp. at 1304.

The District Court for the Western District of Missouri has already decided that venue properly resides in this district under **[\*\*4]** section 1404(a), and defendants' motion is basically a motion for reconsideration. **HN3** The doctrine of law of the case posits that when a court decides a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case. Arizona v. California, 460 U.S. 605, 618, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1982). This rule promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1987) (citations omitted). "Traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court, including its transfer order." Chrysler Credit Corp., 928 F.2d at 1516 (citations omitted).

**HN4** The Court has discretion, however, whether to grant or deny a motion for reconsideration. See Hancock v. City of Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988). In exercising that discretion the Court may recognize any one of three grounds justifying reconsideration: an intervening change in controlling **[\*\*5]** law, availability of new evidence, and the need to correct clear error or prevent manifest injustice. See D. Kan. Rule 7.3,; Marx v. Schnuck Markets, Inc., 869 F. Supp. 895, 897 (D. Kan. 1994); see also Anderson v. United Auto Workers, 738 F. Supp. 441, 442 (D. Kan. 1990) (motion to reconsider appropriate when the Court has obviously misapprehended a party's position, the facts, or the applicable law, or when a party introduces new evidence that could not have been obtained through the exercise of due diligence).

## Factual Background

**KCJ Corporation** ("KCJ") sues **Kinetic Concepts** ("Kinetic") and KCI Therapeutic Services Incorporated ("KCI") for patent infringement. KCJ, a Kansas corporation, is located in Shawnee Mission, Kansas. Myra Carr, Richard Carr and Fran Silvers own all of the stock in KCJ. Carr and Silvers developed the idea for a mattress that would lessen the incidence of bed sores, and in December 1986, KCJ received U.S. Patent No. 4,631,767 on their invention, an "Air Flootation Mattress."

Kinetic is a Texas corporation with its principal place of business in San Antonio. **[\*1215]** Kinetic owns KCI, which is a **[\*\*6]** Texas corporation that markets and distributes KCI products. In November 1987, Carr spoke

with KCI regarding the "Air Floatation Mattress" patent. Initially, KCI expressed interest in manufacturing the mattresses. In January 1988, however, KCI informed Carr that the "Air Floatation Mattress" did not fit into KCI's long range objectives. Plaintiff avers that notwithstanding defendants' stated position on the subject, by June 1989, they were producing and distributing an air floatation mattress in violation of KCJ's patent.

KCJ filed suit in the Western District of Missouri because of docket management policies and procedural rules that promote prompt and cost effective disposition of cases in that district. Pursuant to 28 U.S.C. § 1404(a), defendants sought transfer to the Western District of Texas. In determining appropriate venue, the District Court for the Western District of Missouri gave no deference to plaintiff's choice of forum because plaintiff is not a resident of Missouri. It initially granted defendants' motion to transfer, relying heavily on its determination that a Texas forum would be the most convenient for witnesses.

Dissatisfied with that **[\*\*7]** ruling, plaintiff filed a motion for partial reconsideration, seeking transfer to the District of Kansas. The District Court for the Western District of Missouri, treating the motion as a cross-motion to transfer venue, sustained it and transferred the case to the District of Kansas. Defendants now renew their original motion, again seeking transfer to the Western District of Texas.

### Analysis

This case is atypical in that the District of Kansas is not plaintiff's original choice of forum. Defendants therefore argue that the Court should neither apply the doctrine of law of the case nor afford deference to KCJ's choice of forum, citing Gall v. Home Box Office, 1992 U.S. Dist. LEXIS 19095, 1992 WL 230245 (S.D.N.Y.), and Leiker v. Jarvis Products Corp., 1990 U.S. Dist. LEXIS 10189, 1990 WL 112974 (D. Kan.).

Defendants contend that the Western District of Missouri relied upon the "unusual" case of Lee v. Hunt, 415 F. Supp. 245, 246 (M.D. La. 1976), as authority for transferring this case to Kansas, and in doing so committed clear error. The court in Lee transferred the proceeding under 28 U.S.C. § 1406 [\*\*8] (a) to plaintiff's second choice of forum. Defendants state that while Lee is an unusual decision under 28 U.S.C. § 1406(a), it is even less suited as authority for transfer under 28 U.S.C. § 1404(a).

Defendants also argue that the district court committed error by evaluating plaintiff's motion for partial reconsideration as a cross-motion to transfer. The district court found that defendants' motion to transfer venue gave rise to "changed circumstances" which permitted plaintiff to lodge a

motion for change of venue. See Anadigics, Inc. v. Raytheon Co., 903 F. Supp. 615, 617 (S.D.N.Y. 1995). Defendants contend that the district court allowed plaintiff to successfully forum shop by not simultaneously ruling on the motion to transfer and the cross-motion to transfer.

Defendants finally contend that it is in the interest of justice to transfer the case to Texas. Defendants argue that the relevant factors, such as the location of witnesses, weigh in favor of transfer to Texas and that the district court transferred the case to Texas only after it gave great weight to plaintiff's choice of forum.

The argument that **[\*\*9]** Judge Sachs should have afforded no deference to plaintiff's choice of forum centers on defendants' belief that deference encourages forum shopping and that deference therefore constitutes clear error. This argument finds some support in Leiker, 1990 WL 112974 at \*2, where plaintiff filed suit in the District of Kansas then sought transfer to the District of Connecticut. The court in that case afforded no deference to plaintiff's second choice of venue and denied the motion. See *id.* The court was concerned that if it deferred to plaintiff's second choice of forum "a motion to transfer venue could become an unchecked tool for the plaintiff to shop among forums and between judges." *Id.* Similarly in Gall, 1992 WL 230245, the court denied plaintiff's motion to transfer venue, determining that "the deference ordinarily given plaintiff's choice of **[\*1216]** forum would be inappropriate" because it was plaintiff who sought transfer. *Id.* at \*6.

This case is distinguishable from both Gall and Leiker, and those cases do not convince the Court that plaintiff's second choice of forum should receive no weight in this case. In Gall **[\*\*10]** and Leiker, plaintiffs tried to transfer cases from fora that they had initially selected. In this case plaintiff learned that it could not maintain suit in its chosen venue, and only then did it seek another suitable forum. A more important distinction is that the parties in Leiker and Gall were not asking the court to reconsider the law of the case, as defendants do in this case.

Defendants' concern that plaintiff has engaged in forum shopping may have merit, in that plaintiff brought this action in the Western District of Missouri in an attempt to save time and resources. Its motive in doing so appears benign, however, in light of the fact that the Supreme Court and the Tenth Circuit Court of Appeals have both condoned considerations of practical problems that make a trial easy, expeditious and economical. See Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 91 L. Ed. 1055, 67 S. Ct. 839 (1949)). By choosing the Western District of Missouri, plaintiff simply made a calculated decision regarding the practicalities of litigation. It does not appear that plaintiff **[\*\*11]** chose Missouri or Kansas to "vex,

harass, or oppress" defendants by inflicting upon them expense or trouble.  
Gulf Oil Corp., 330 U.S. at 508.

Plaintiff's earlier preference for the Western District of Missouri should not undermine Judge Sachs' decision to transfer the case to the District of Kansas. This case involves patent law and the possibility of misinterpreting Missouri law is not present. Any advantage that plaintiff gains in a transfer to this district is not one of law, and this factor distinguishes plaintiff's action from the traditional notion of forum shopping. The Court does not believe that Judge Sachs committed clear error in affording great deference to plaintiff's choice of forum.

Defendants' argument that the district court erred in treating plaintiff's motion for a cross-motion for transfer, rather than a motion for reconsideration, is also unpersuasive. From the record it is evident that Judge Sachs thoughtfully considered the law and the relevant evidence. Whether to transfer venue was a question committed to his sound discretion and the Court sees no evidence that he abused it either procedurally or substantively.

In summary, defendants' **[\*\*12]** argument that justice requires transfer to Texas must fail. Defendants rely on many of the same arguments that they addressed to Judge Sachs. The function of a motion to reconsider, however, is not to allow defendants to rehash arguments previously addressed and rejected, or to present legal theories that could have been raised earlier. n3 See Barrett v. Fields, 941 F. Supp. 980, 984-85 (D. Kan. 1996).

----- Footnotes -----

n3 The standards for reconsideration are the same under District of Kansas Rule 7.3 and under Fed.R.Civ.P. 59(e). See Steele v. Ellis, 961 F. Supp. 1458, 1467 (D. Kan. 1997).

----- End Footnotes -----


Defendants have not demonstrated that the Western District of Missouri committed clear error in transferring the case to this district instead of the Western District of Texas. The Court agrees with Judge Sachs that transfer to the Western District of Texas is not necessary in the interest of justice or for the convenience of the parties and witnesses. Transferring the case to Texas would only shift defendants' **[\*\*13]** inconvenience to plaintiff. This case has now endured three rulings on appropriate venue, and it is time for the case to proceed on the merits.

**IT IS THEREFORE ORDERED** that defendants' Motion To Transfer Venue (Doc. # 47) filed March 25, 1998 be and hereby is overruled.

Dated this 4th day of August, 1998, at Kansas City, Kansas.

KATHRYN H. VRATIL

UNITED STATES DISTRICT JUDGE






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*30 F. Supp. 2d 1319, \*; 1998 U.S. Dist. LEXIS 20508, \*\**

**KCJ CORPORATION**, Plaintiff, v. **KINETIC CONCEPTS, INC.**, et. al.,  
Defendants.

CIVIL ACTION No. 98-2047-KHV

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

30 F. Supp. 2d 1319; 1998 U.S. Dist. LEXIS 20508

December 22, 1998, Decided

December 22, 1998, Filed; December 23, 1998, Entered on the Docket

### CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff patent holder filed suit against defendant corporation, asserting that defendant willfully infringed plaintiff's patent by manufacturing and selling therapeutic low air loss mattress devices. The matter came before the court on motions in which the parties asked the court to construe claim one of the patent as a matter of law.


**OVERVIEW:** Plaintiff patent holder asserted that defendant corporation willfully infringed plaintiff's patent by manufacturing and selling therapeutic low air loss mattress devices. The parties asked the court to construe claim one of the patent as a matter of law. The court ordered that claim one of the patent would be construed in a manner consistent with the court's memorandum and order. The court held that the phrase "a lower, continuous, inflatable chamber" meant one non-interrupted inflatable chamber. The court held that the phrase "substantially uniform airflow therethrough over substantially the entire plan surface area" meant air flow at substantially the same rate at substantially all locations on the surface. The court held that the phrase "operably coupled with said chamber defining means" meant that two elements work in concert to create an inflatable chamber.

**OUTCOME:** In plaintiff patent holder's suit asserting that defendant corporation willfully infringed plaintiff's patent, the court ordered that claim one of the patent would as a matter of law be construed in a manner consistent with the court's memorandum and order. The court held that the language of the claim was to be given its ordinary meaning.

**CORE TERMS:** patent, chamber, air, secondary, upper, mattress, continuous, pad, inflatable, apparatus, surface area, specification, compartment, coupled, operably, alternating, skill, air flow, surface, airflow, therethrough, air mattress, interdigitated, alternately, examiner, air-permeable, invention, original application, constructed, patient

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**LexisNexis (TM) HEADNOTES - Core Concepts - ♦ [Hide Concepts](#)**

Patent Law > Jurisdiction & Review > Standards of Review 


**HN1** The construction of a patent is a question of law for a court. [More Like This Headnote](#)

Patent Law > Jurisdiction & Review > Standards of Review 

**HN2** In construing patent claims, the court should look first to the intrinsic evidence of record, that is, the patent itself, including the claims, the specification and, if in evidence, the prosecution history. The court must determine how the claim would be interpreted by one of ordinary skill in the art at the time the patent was issued. [More Like This Headnote](#)

Patent Law > Jurisdiction & Review > Standards of Review 

**HN3** The analysis of patent claims begins with the words of the claims. The language of the claim is to be given its ordinary meaning to a person of ordinary skill in the relevant art, unless it appears from the patent and the file history that the terms were used differently by the inventor. Thus, a patentee is not limited to ordinary dictionary definitions of terms, but is free to be his or her own lexicographer. [More Like This Headnote](#)

Patent Law > Jurisdiction & Review > Standards of Review 

**HN4** Claims must be read in view of the specification, of which they are a part. The specification includes a written description of the invention and a best mode or preferred embodiment of the invention. The specification must enable a hypothetical person having ordinary skill in the art to make and use the invention, and so is typically drafted in some sense as an interpretive guide in reading the claims. The limitations in particular

embodiments should not be read into the claims, although the court may use the embodiments as definitional guides for words in the claims. The court should also consider the prosecution history or "file wrapper," if in evidence, to ascertain the meaning of any claim. The construction of the patent may be confirmed by the inventor's understanding of the claimed invention. Although the prosecution history can and should be used to understand the language used in the claims, it too cannot enlarge, diminish, or vary the limitations in the claims. [More Like This Headnote](#)

[Patent Law](#) > [Jurisdiction & Review](#) > [Standards of Review](#) 

**HNS** The court, in patent claims, may consider extrinsic evidence, including publications, dictionaries, and expert testimony, if necessary to assist in determining the meaning or scope of terms in the claims. Extrinsic evidence is to be used for the court's understanding of the patent, not for the purpose of varying or contradicting the terms of the claims. But this evidence is not for the purpose of clarifying ambiguity in claim terminology. The claims themselves set the metes and bounds of the inventor's right to exclude others from practicing the invention. [More Like This Headnote](#)

**COUNSEL:** **[\*\*1]** Marcus N. Bozeman, Marcus N. Bozeman, Vivian W. McLeod, Lawrence A. Rouse, Rouse, Hendricks, German, May & Shank, Kansas City, MO, for defendants.

Marcus N. Bozeman, Vivian W. McLeod, Lawrence A. Rouse, Rouse, Hendricks, German, May & Shank, Kansas City, MO, for movant.

Stacy Y Daniels, Spencer, Fane, Britt & Browne, Overland Park, KS, for plaintiff.

Michael F. Saunders, Terry W. Schackmann, Therese M. Schuele, Teresa A. Woody, Spencer, Fane, Britt & Browne, Kansas City, MO, for plaintiff.

**JUDGES:** Kathryn H. Vratil, United States District Judge.

**OPINIONBY:** Kathryn H. Vratil

**OPINION: [\*1320] MEMORANDUM AND ORDER**

**KCJ Corporation** has filed suit against **Kinetic Concepts, Inc.** and **KCI Therapeutic Services, Inc.**, asserting that they willfully infringed plaintiff's U.S. Patent No. 4,631,767 [the '767 patent] by manufacturing and selling

therapeutic low air loss mattress devices. This matter comes before the Court on motions pursuant to Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995), aff'd, 517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996), in which the parties ask the court to construe claim 1 of the '767 patent as a matter of law. See Plaintiff KCJ's **[\*\*2]** Motion For Summary Judgment As To Claim Interpretation (Doc. # 227) and Defendants' Motion For Partial Claim Construction And For Summary Judgment Based On That Construction (Doc. # 231), both filed October 21, 1998. n1 Consistent with the evidence presented at a Markman hearing on December 17, 1998, the Court finds as a matter of law that claim 1 of the '767 patent has the meaning and scope set forth below.

----- Footnotes -----

n1 In this memorandum and order the Court addresses only the issue of claim construction.

----- End Footnotes -----

### **[\*1321] Claim Construction Standards**

**HN1** The construction of a patent is a question of law for the Court. Markman v. Westview Instruments, Inc., 517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996).

### **Background**

On November 21, 1984, Myra Carr, Francis Brosig, and Robert Gottlieb applied to the United States Patent and Trademark Office (the "PTO") for a patent for a so-called Air Flotation Mattress "for use in the treatment of patients in hospitals, nursing homes and home care." Plaintiff's Ex. 2, Tab **[\*\*3]** A, p.1. On January 3, 1985, the applicants assigned their rights in the patent application to KCJ Corporation. n2 Plaintiff's Ex. 2, Tab B.

----- Footnotes -----

n2 Myra Carr, her husband Richard Carr, and Fran Brosig-Silvers formed KCJ Corporation on April 16, 1984. Myra and Richard Carr are now the only two shareholders of KCJ; Ms. Carr is president of KCJ.

----- End Footnotes -----

The patent examiner rejected plaintiff's original application for obviousness based on prior art stating as follows:

Claims 1-4 and 7-10 are rejected under 35 U.S.C. § 103 as being unpatentable over Schild et al in view of Gammons et al.

Schild et al shows an air mattress which consists of a pressure pad 28 enclosed within a removable surrounding cover 27. (See Fig. 4). The cover 27 forms a plenum with a ventilating support surface 25, air is pumped into the plenum and exists (sic) through passages 29. Note that Schild et al disclose that the pressure pad 28 could be replaced with a conventional air mattress, also note the embodiment of Fig. 3. Gammons et al teach that **[\*\*4]** a pressure pad can also be used to provide body ventilation by providing passages 24 and 25 upon the pad surface. It would have been obvious to one of ordinary skill in the art to provide Schild's pressure pad with ventilating passages as taught by Gammons, also many differing materials could be used in the construction of Schild, any particular material would have been an obvious matter of choice.

Claims 5 and 6 are rejected under 35 U.S.C. as being unpatentable over Schild in view of Gammons as applied to claim 2 above, and further in view of Harris et al.

Harris et al teach that an air mattress can have parallel baffles with end manifolds, it would have been obvious to one of ordinary skill in the art to construct Schild's pressure pad in this fashion.

Nos, Lapidus, Crane, and Stanton show relevant art.

Plaintiff's Ex. 2, Tab C, p. 2-3.

The Gammons Patent, U.S. Patent No. 4,347,633 was issued on September 7, 1982. The Schild Patent, U.S. Patent No. 4,391,009 was issued on July 5, 1983. The Court has reviewed each of these patents, and provides only a brief summary of each here.

The Gammons patent disclosed an interdigitated mattress chamber with

two air cells that interrupted **[\*\*5]** each other along the length of the mattress and were alternately inflated and deflated to provide support for the patient's body. Gammon patent, Col. 4, 1.52-55; Fig. 4 & 6. The Gammons mattress had "vent holes in its top for ventilating the patient with inflation gas," see Gammons abstract, and the patent revealed a mattress with three rows of ventilating passages equidistant from one another. Gammons patent, Fig. 4. The patent observed that certain mattresses in the prior art had a tendency to "crawl" on the bed surface because the sequential inflation and deflation of parts of the mattress "acted somewhat like raising and lowering alternating feet of a multi-legged caterpillar or worm." Gammons patent, Col. 1, 1.27-31. The Gammons patent also noted that different kinds of pads did not have the "crawl" problem because they did not alternately inflate air passages; instead, such pads were continuously inflated with a circulating liquid and adjoining sections did not sequentially inflate and deflate. Id., Col. 1, 1.52-58.

The Schild patent claimed a plenum chamber with a plurality of apertures. It also claimed "alternating inflatable support . . . having a first set of bubble **[\*\*6]** like cells which are interdigitated with a second set of aligned bubble like cells for giving sole support to . . . [a] living body." Schild patent, Col. 6, 1.21-25. The Schild patent claimed a pump "coupled to said alternating inflatable support means for alternately inflating at a relatively high pressure said first and second **[\*1322]** interdigitated sets of aligned bubble like cells." Id., Col. 6, 1.27-30. As noted by the patent examiner, the Schild patent disclosed that the alternating inflatable support (pressure pad) could be replaced with a conventional air mattress.

After the patent examiner rejected plaintiff's original application for obviousness based on prior art, plaintiff amended its application, asserting that the amended claim distinguished the prior art cited by the patent examiner:

The structure defined in Claim 1 as amended is nowhere suggested or intimated in any of the prior art of record. The primary reference to Schild et al., Patent No. 4,391,009, describes with reference to Fig. 4 a body support including a central pad 28 and a surrounding envelope defined by sheets 25 and 26. The pad 28 may be an alternative pressure pad, or a conventional mattress. In neither **[\*\*7]** event, however, does the Schild et al. reference suggest the structure now claimed. Thus, if use is made of an alternating pressure pad . . . it is clear that the structure defined in Claim 1 is not met. Thus, the alternating pressure pad of the Schild et al.

reference includes alternating sets of channels together with an air pump and valve assembly designed to "cause adjacent channels 12 to be inflated and deflated alternately so that the weight of the user is carried alternately on discrete regions defined by the two sets of channels." (citation omitted).

On the other hand, claim 1 as now amended specifically and unambiguously recites means for introduction of positive pressure air into the chamber in order to "continuously maintain positive air conditions throughout the entirety of operation of said mattress apparatus. . ." In no way does the alternating pad of the Schild et al. reference supply positive air pressure throughout the entirety of the chamber during all operations of the mattress. Indeed, this is specifically to be avoided in Schild et al. and to this end the respective channels are alternately supplied with positive pressure air and then deflated. Moreover and very **[\*\*8]** importantly, the Schild et al. reference does not provide an internal or lower chamber having air permeable upper wall means as clearly claimed in Claim 1. To the contrary, the upper sheet 11 of the pad 28 is formed of "plastic", and the two sheets 11 are hermetically sealed together (see col. 3, lines 28 ff.). Obviously, Schild et al. does not employ an upper wall which is constructed "for substantially uniform passage of air therethrough over substantially the entire plan surface area of said upper wall", as is specifically recited in Claim 1 as amended.

The Gammons et al. reference is likewise very different from the structure as claimed in the present claims. In Gammons et. al. the mattress 3 has two sets of independent passages which are alternately inflated by pumping means 10.

Above the mattress 3 is provided a diffusion pad 4 of open cell foam material. During inflation of either of the passages 13 or 14, vent holes 24 and 25 discharge a portion of the ventilating gas for an attempt to ventilate the patient through the porous pad 4. Here again, though, it will be readily perceived that Gammons et al. does not employ a chamber having an upper wall which is constructed **[\*\*9]** for substantially uniform air flow through substantially the entire plan surface of the upper wall. Moreover, Gammons et al. does not provide means for continuously maintaining positive air pressure conditions throughout the entirety of the lower chamber during the entirety of the operation of the mattress apparatus. As noted with respect to the Schild et al. reference, the alternating inflation-deflation concept is the antithesis of the structure

now claimed.

Plaintiff's Ex. 2, Tab D., 4-5.

On December 30, 1986, the PTO issued KCJ the '767 patent. In doing so it approved Claim 1, including the amendments to the claim which are set forth in italics below:

We claim:

1. "An air flotation, ventilated mattress apparatus comprising:  
[a)] means defining a lower, *continuous*, inflatable chamber having an air-permeable, flexible upper wall *portion*,  
[b)] *said upper wall portion being constructed for substantially uniform airflow therethrough over substantially the entire* **[\*1323]** *plan surface area of said upper wall portion*;  
[c)] air-permeable secondary wall means above said *chamber* upper wall portion and operably coupled with said chamber-defining means,  
[d)] **[\*\*10]** *said secondary wall means being constructed for substantially uniform passage of air therethrough over substantially the entire plan surface area of said secondary wall means*,  
[e)] said secondary wall means and upper wall cooperatively defining therebetween an inflatable compartment above said chamber; and  
[f)] means for continuously introducing positive pressure air into said chamber in order to *continuously maintain positive air pressure conditions throughout the entirety of said chamber during the entirety of operation of said mattress apparatus and* to inflate both said chamber and compartment by passage of said air into said chamber and thence through said upper wall *portion and thereby maintain positive air pressure conditions in said compartment*, and to cause *said* continuous passage of air through said secondary wall means,  
[g)] said mattress apparatus being free of solid internal support structure [capable of] *for* supporting a patient,  
[h)] said air introduction means, upper wall portion and secondary wall means being cooperatively configured and arranged for continuous passage of sufficient *positive pressure* airflow [under pressure] through **[\*\*11]** *the chamber, upper wall portion, compartment, and secondary wall means for even, substantially uniform flow of air from said mattress apparatus* so that a person lying atop the secondary wall means is supported by said [pressured] *pressurized* air without

the presence of weight-supporting structure within said mattress apparatus."

'767 patent, Col. 6, 1. 7-46 (letters added for ease of discussion).

### Claim Construction

**HN2** ¶ In construing patent claims, the Court should "look first to the intrinsic evidence of record, i.e., the patent itself, including the claims, the specification and, if in evidence, the prosecution history." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996) (citing Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed. Cir. 1995), aff'd, 517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996)). The Court must determine how the claim would be interpreted by one of ordinary skill in the art at the time the patent was issued. Markman, 52 F.3d at 986.

**HN3** ¶ The analysis begins with the words of the claims. The language of the claim is to be given its ordinary meaning to a person of ordinary skill in the relevant **[\*\*12]** art, unless it appears from the patent and the file history that the terms were used differently by the inventor. Intellicall, Inc. v. Phonometrics, Inc., 952 F.2d 1384, 1387 (Fed. Cir. 1992). Thus, a patentee is not limited to ordinary dictionary definitions of terms, but is free to be his or her own lexicographer. Fromson v. Advance Offset Plate, Inc., 720 F.2d 1565, 1569 (Fed. Cir. 1983).

**HN4** ¶ "Claims must be read in view of the specification, of which they are a part." Markman, 52 F.3d at 979. The specification includes a written description of the invention and a best mode or preferred embodiment of the invention. Id. "The specification must enable a hypothetical person having ordinary skill in the art to make and use the invention, and so is typically drafted in some sense as an interpretive guide in reading the claims." Mediacom Corp. v. Rates Tech., Inc., 4 F. Supp. 2d 17, 25 (D. Mass. 1998). The limitations in particular embodiments should not be read into the claims, although the Court may use the embodiments as definitional guides for words in the claims. Ethicon Endo-Surgery, Inc., v. U.S. Surgical Corp., 93 F.3d 1572, 1574-76 (Fed. Cir. 1996). The Court **[\*\*13]** should also consider the prosecution history or "file wrapper," if in evidence, to ascertain the meaning of any claim. Markman, 52 F.3d at 979. The construction of the patent may be confirmed by the inventor's understanding of the claimed invention. Id. "Although the prosecution history can and should be used to understand the language used in the claims, it too cannot enlarge, diminish, or vary the limitations in the **[\*1324]** claims." Id. (further quotations and citations omitted).

Finally, <sup>HN5</sup>the Court may consider extrinsic evidence, including publications, dictionaries, and expert testimony, if necessary to assist in determining the meaning or scope of terms in the claims. Vitronics Corp., 90 F.3d at 1583. Extrinsic evidence "is to be used for the court's understanding of the patent, not for the purpose of varying or contradicting the terms of the claims." Markman, 52 F.3d at 981. "But this evidence is not for the purpose of clarifying ambiguity in claim terminology." Id. at 986. The claims themselves set the metes and bounds of the inventor's right to exclude others from practicing the invention.

Adhering to the above legal principles, the Court received evidence **[\*\*14]** at the Markman hearing for the purpose of better understanding the technology of ventilated medical air mattress devices. The parties disagree on the proper construction of several terms in Claim 1 of the '767 patent and at the hearing, expert witnesses for both sides expressed legal opinions as to how those terms should be construed. The Court has afforded such testimony no deference and considered it merely as an extension of counsels' legal arguments. See Markman, 52 F.3d at 983 (inventor and patent attorney testimony about claim construction is legal opinion entitled to no deference).

The claim language which the Court must construe is set forth below.

**A. Construction of Clause (a): "means defining a lower, continuous, inflatable chamber having an air-permeable, flexible upper wall portion"**

The '767 patent claims an air flotation, ventilated mattress apparatus comprising, among other things, "means defining a lower, continuous, inflatable chamber having an air-permeable, flexible upper wall portion." The parties disagree whether such language claims one *or more* chambers, and focus their dispute around the meaning of the terms "a" and "continuous." Plaintiff **[\*\*15]** alleges that the language claims a mattress apparatus with at least one chamber, which is "continuous" in that it is not interrupted, interdigitated, or broken in its structure. Defendants contend that the reference to "a . . . continuous" chamber requires a single chamber which is not divided into separate sections that are independently capable of containing air. The parties agree that the term "continuous" means non-interrupted, i.e. extending without interruption or break. n3 See Plaintiff's Ex. 1; Defendants' Ex. 404. Their principal dispute centers around the term "a" and whether the reference to "a . . . chamber" encompasses multiple chambers.

----- Footnotes -----

n3 Plaintiff asserts that the patent examiner rejected the original application because earlier patents described the use of interdigitated chambers that alternately inflated and deflated, and the amended application added the word "continuous" to distinguish that prior art. As noted above, all parties agree that "continuous" means non-interrupted and that an interdigitated mattress does not have a "continuous" chamber under that definition. "Continuous" is not synonymous with "non-interdigitated," however, to a person of ordinary skill in the relevant art. Moreover, the Court is not persuaded from the patent and the file history that the term "continuous" was used by the inventor to mean "non-interdigitated."

Plaintiff cannot convincingly insist that "continuous" means *only* non-interdigitated. From all that appears in the patent record, the examiner did not reject the original application on the basis that it failed to distinguish prior art with reference to interdigitated chambers. The examiner found that plaintiff's device combined the pressure pad of Schild's with ventilating passages taught by Gammons and after noting that "the Schild et al disclosed that the pressure pad could be replaced with a conventional air mattress," concluded that because "Harris et al teach that an air mattress can have parallel baffles with end manifolds," it would have been obvious to one of ordinary skill in the art to construct Schild's pressure pad in that fashion. Plaintiff's Ex. 2, Tab C, p. 3. The language which the patent examiner used in rejecting the original application does not suggest that he read the original application to claim an interdigitated mattress. In fact, the record clearly shows that he read the original application to include an air mattress with parallel baffles and end manifolds.

Moreover, although plaintiff relies heavily on the file history to argue that the patentee added the word "continuous" to distinguish its claims from the alternating pressure pads in Schild, this position ignores the fact that the Schild patent provided an alternative design claim with no alternating pressure.

- - - - - End Footnotes - - - - - **[\*\*16]**

Defendants focus on the claim language, which provides for "a . . . chamber," and **[\*1325]** notes that references to that chamber are repeatedly made in the singular. Defendants cite patent cases using singular terms, where the Federal Circuit has ruled that a given device contains only one of the component. See, e.g., Insituform Techs, Inc. v. Cat Contracting, Inc., 99 F.3d 1098, 1105-06 (Fed. Cir. 1996) ("claim 1 refers to 'a cup' and 'the cup' repeatedly, suggesting that only one cup is

involved"), cert. denied, 520 U.S. 1198, 117 S. Ct. 1555, 137 L. Ed. 2d 703 (1997). Plaintiff counters that "it is generally accepted in patent parlance that 'a' can mean one or more." North Am. Vaccine, Inc. v. American Cyanamid Co., 7 F.3d 1571, 1575-76 (Fed. Cir. 1993), cert. denied, 511 U.S. 1069, 128 L. Ed. 2d 365, 114 S. Ct. 1645.

The articles "a" or "an" are ordinarily given a singular construction; a plural construction is appropriate only if the specification indicates that this was intended. 7 F.3d at 1576; see also Brita Wasser-Filter-Systeme GMBH v. Recovery Eng'g, Inc., 1998 U.S. Dist. LEXIS 12491, 1998 WL 473467 (N.D.Ill Aug. 7, 1998) (patent claimed "an" opening in the sleeve, and specification provided **[\*\*17]** no embodiment with more than a single opening in the sleeve; the court read this to "disclose a single opening in the sleeve and no more."). A review of file history is particularly relevant where words were added to the claim to overcome specific prior art, see Lemelson v. General Mills Inc., 968 F.2d 1202, 1206 (Fed. Cir. 1992), but that principle is of less assistance than basic common sense in resolving the matter at issue.

The Court has little hesitation in concluding that the reference to "a . . . continuous . . . chamber" means exactly what it says: one continuous chamber. Plaintiff's position is untenable because the concept of multiple chambers is at fundamental odds with the concept of continuity, and discrete multiple chambers cannot be read into the patent without sacrificing the concept of continuity. It would be oxymoronic, for example, to speak of multiple continuous chambers: if any five chambers are non-interrupted, they are not five chambers but one. On the other hand, if five chambers are insular and merely contiguous, the mattress apparatus will not comprise means defining a non-interrupted chamber. A mattress apparatus might have five discrete chambers, each **[\*\*18]** "continuous" only unto itself, but a person of ordinary skill in the relevant art would not describe such an apparatus as one which comprises "means defining a . . . continuous . . . chamber." Such a person more accurately would describe the apparatus as one which comprises "one lower, continuous, inflatable chamber or two or more lower, non-continuous, inflatable chambers." Nothing in the language of the claim, the patent, or the file history suggests such an interpretation.

In summary, the Court believes that the phrase "a lower, continuous, inflatable chamber" has a plain meaning in light of the '767 claims, the '767 specification, and the '767 prosecution history. A person of ordinary skill in the art of air bed engineering would read the phrase "continuous" to mean without interruption and the word "a" to mean one. Thus, the Court determines as a matter of law that the phrase "a lower, continuous, inflatable chamber" claims one non-interrupted inflatable chamber.

**B. Construction of Clauses (b) and (d): Clause (b): "said upper wall portion being constructed for substantially uniform airflow therethrough over substantially the entire plan surface area of said upper wall [\*\*19] portion." Clause (d): "said secondary wall means being constructed for substantially uniform passage of air therethrough over substantially the entire plan surface area of said secondary wall means."**

The '767 patent claims an air flotation, ventilated mattress apparatus comprising, among other things, an upper wall portion and a secondary wall means that are "constructed for substantially uniform passage of air therethrough over substantially the entire plan surface area of said secondary wall means." n4 The parties agree that when the claim language refers to "substantially uniform [\*\*1326] passage of air," it means airflow which is substantially steady, constant or continuous, as opposed to fluctuating, intermittent or alternating over time. See Plaintiff's Ex. 1; Defendants' Ex. 408 ("person of ordinary skill in the art would read 'uniform airflow' to mean air flows at essentially the same rate. . . ."). They disagree about *where* the patent claims the substantially steady air flow will occur. Plaintiff alleges that although the patent claims "substantially uniform passage of air therethrough over *substantially the entire plan surface area*," the claim does not specify the [\*\*20] spatial location through or at which air will flow. Rather, according to plaintiff, it means that air flow will be constant "wherever air flows." n5 According to defendants, the requirement for "substantially uniform airflow . . . over substantially the entire plan surface area" means that at substantially all locations on the plan surface, air flows at essentially the same rate. n6

----- Footnotes -----

n4 The patent claims for the upper wall portion and the secondary wall means are substantially identical, except that the upper wall portion claims "substantially uniform airflow" and the claim regarding the secondary wall means is for "substantially uniform passage of air." The difference is not material to any issue before the Court.

n5 Among other problems with plaintiff's argument, it is hopelessly circular. As noted, plaintiff alleges that the claim language ("over substantially the entire plan surface area") does not specify the spatial location through or at which air will flow, but merely means that air flow will be constant "wherever air flows," and that "this is true" over substantially the entire plan surface. What plaintiff really argues, though it is less than candid in framing the issue, is that the Court should altogether ignore the claim requirement that air flow at a substantially uniform rate

"over substantially the entire plan surface area." **[\*\*21]**

n6 Although defendants' motion refers to "are" flow, it is clear from defendants' supporting memorandum that the intended word is "air."

----- End Footnotes-----

Plaintiff argues that if the Court were to adopt defendants' proffered construction, the invention would be impossible to make because when a patient lays on the mattress, air cannot flow at the points of contact. n7 Plaintiff's interpretation ignores the fact that the "uniform air flow" clauses continue with "therethrough over substantially the entire plan surface area of [said secondary wall means and upper wall portion]. The claim demands that air flow through all locations on the surfaces. Defendants' construction would seem to give the proper meaning in context. Further, as defendants point out, the claim sets out a mattress with an "air permeable wall." Because the patent does not suggest that this permeability varies substantially from place to place, it is logical to conclude that the patent intended air flow which is uniform in space. This conclusion is supported by the fact that in distinguishing Schild, plaintiff mentioned that Schild included a **[\*\*22]** non-permeable upper wall means. Further, the patent specification mentions many times the need to ventilate the patient's skin at all adjacent areas.

----- Footnotes-----

n7 This argument must fail. The claim is for a mattress apparatus which has certain characteristics, including air flow "over substantially the entire plan surface." The patent does not claim that air flow will be unaltered when a human body lies on the surface; it only addresses the mechanical engineering of the apparatus.

----- End Footnotes-----

The Court finds that the phrase "substantially uniform airflow therethrough over substantially the entire plan surface area" has a plain meaning in light of the '767 claims, the '767 specification, and the '767 prosecution history. A person of ordinary skill in the art of air bed engineering would read "substantially uniform airflow" to mean airflow that does not substantially fluctuate over time. When added to the words "over substantially the entire plan surface," the claim requires that air flow at

substantially the same rate at substantially [\*\*23] all locations on the surface.

**C. Construction of Clause (c): "air-permeable secondary wall means above said chamber upper wall portion and operably coupled with said chamber-defining means."**

The '767 patent claims an air flotation, ventilated mattress apparatus comprising, among other things, "air-permeable secondary wall means above said chamber upper wall portion and operably coupled with said chamber-defining means." The parties disagree about the meaning of "operably coupled." According to plaintiff, the term means that "the two elements are in mutual relation so that the operation of one works with the other to achieve a common result." Plaintiff's Ex. 401. More specifically, plaintiff argues,

this limitation means that there is at least one air-permeable cover sheet (or secondary [\*\*1327] wall) that overlies the upper wall of the chamber. This secondary wall is connected, linked, or attached in some way to the chamber described in clause (a). This would include any operable method of coupling a cover sheet with a mattress, and specifically includes attaching a cover sheet to a mattress with straps or elastic bands.

Defendants disagree, arguing that under the [\*\*24] patent language the secondary wall means and the upper wall portion must be "chamber-defining" in order to be "operably coupled." Defendants' Ex. 414. More specifically, according to defendants,

this limitation speaks of a "secondary wall means" that is "operably coupled" with the lower chamber. Defendants move this Court to interpret "operably coupled" so that it requires a device which (1) possesses a compartment "defined between" the upper wall and secondary wall, and (2) is assembled so as to allow the inflation of that compartment and the flow of air through "substantially the entire plan surface area" of the secondary wall.

Plaintiff contends that "operably coupled" means simply that those elements "be in such a mutual relation that the operation of one interacts with the operation of the other to achieve a common result -- not that they are mechanically joined to provide a particular function described

elsewhere in the claim." n8 Plaintiff's Claim Construction Brief at 14. Plaintiff asserts that defendants' interpretation seeks to limit the claims to the preferred embodiment described in the specification or to the features of prototypes of the invention. Plaintiff **[\*\*25]** asserts that it is improper to read into the claim limitations from the specification. Electro Medical Sys., S.A. v. Cooper Life Sciences, Inc., 34 F.3d 1048, 1054 (Fed. Cir. 1994).

----- Footnotes -----

n8 According to plaintiff, the coupling could be accomplished by snaps, zippers, buttons, velcro straps, elastic bands or other means.

At the Markman hearing plaintiff's expert testified that the term "operably coupled" should be read to mean two things that are mutually related so that the work of one thing is coupled with the work of the other. Plaintiff's expert testified that the term did not require that the items be physically attached. This opinion is not consistent with the meaning proffered in plaintiff's briefs.

----- End Footnotes -----

Defendants first rely upon the claim language that the upper wall of the lower chamber should combine with the secondary wall to "cooperatively define[] therebetween an inflatable compartment above said chamber." '767 patent, col. 6, 1.23-25. The secondary wall must allow "substantially uniform passage **[\*\*26]** of air therethrough over substantially the entire plan surface area of the secondary wall means." Id., 1.20-22. Defendants argue that to serve the goals of the operable coupling the device must have a compartment "defined [] between" the upper wall and secondary wall and must be assembled to allow inflation of that compartment and the flow of air through "substantially the entire plan surface area" of the secondary wall.

Defendants also rely upon the specification that the upper compartment "inflate" and that the operable coupling should "define" the compartment "[ ]between" the upper wall of the lower chamber and the secondary wall. Defendants then point to the description of drawings that "the secondary wall 36 is detachably secured by means of a conventional zipper 38 at a point proximal to the joinder between the sidewall 24 and top wall 26. As seen in Fig. 3, an inflatable compartment 40 is defined between the top wall 26 and the secondary wall 36."

In the '767 patent, the function of the secondary wall means is to define,

in cooperation with the upper wall portion, an inflatable compartment above the lower chamber. '767 Patent, Col. 6, 1.21-23. The Court believes that **[\*\*27]** the phrase "operably coupled with said chamber defining means" has a plain meaning in light of the '767 claims, the '767 specification, and the '767 prosecution history. A person of ordinary skill in the art of air bed engineering would read "operably coupled" to mean that two elements work in concert to create an inflatable chamber, e.g. one which is not air tight but can receive and hold air. Thus, whatever means is used to operably couple must create an inflatable chamber between the top wall and the secondary wall.

**IT IS THEREFORE ORDERED THAT** claim one of the '767 patent will as a matter **[\*1328]** of law be construed in a manner consistent with this memorandum and order.


**IT IS FURTHER ORDERED THAT** the parties shall file reply briefs regarding the outstanding motions for summary judgment on or before January 5, 1999.

**IT IS FURTHER ORDERED THAT** the status conference in this case previously set for January 7, 1999, shall be rescheduled for January 14, 1999 at 7:30 a.m.

Dated this 22nd day of December, 1998, at Kansas City, Kansas.

Kathryn H. Vratil

United States District Judge






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*39 F. Supp. 2d 1286, \*; 1999 U.S. Dist. LEXIS 3125, \*\**

**KCJ CORPORATION**, Plaintiff, v. **KINETIC CONCEPTS, INC.**, et. al.,  
Defendants.

CIVIL ACTION No. 98-2047-KHV

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

*39 F. Supp. 2d 1286; 1999 U.S. Dist. LEXIS 3125*

January 13, 1999, Decided  
January 13, 1999, Filed

**DISPOSITION:** **[\*\*1]** Defendants' Motion For Partial Claim Construction And For Summary Judgment Based On That Construction filed October 21, 1998 SUSTAINED. Plaintiff KCJ's Motion For Summary Judgment As To Infringement filed October 21, 1998 OVERRULED. Defendant's Motion For Partial Summary Judgment filed October 21, 1998 OVERRULED as moot. All pending motions in limine OVERRULED as moot.

### **CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiff corporation filed a motion for summary judgment as to infringement and defendant corporations filed a motion for summary judgment as to partial claim construction in a patent infringement action.


**OVERVIEW:** Plaintiff corporation filed a patent infringement action against defendant corporations. Plaintiff alleged that defendants willfully infringed its patent by manufacturing and selling certain therapeutic low air loss mattresses. Plaintiff filed a motion for summary judgment as to infringement and defendants filed a motion for summary judgment as to partial claim construction. The court granted defendants' motion, but denied plaintiff's motion, holding that defendants did not literally infringe plaintiff's patent because a literal infringement claim was precluded by the court's claim construction, thus, defendant was entitled to summary


judgment on the literal infringement claim. The court found that, based on its claim construction and its examination of the file history, plaintiff was estopped from asserting infringement under the doctrine of equivalents.


**OUTCOME:** The court granted defendants' motion for summary judgment and denied plaintiff's motion for summary judgment. The court held that plaintiff was estopped from asserting infringement under the doctrine of equivalents and that defendants had not literally infringed plaintiff's patent because a literal infringement claim was precluded.


**CORE TERMS:** air, mattress, patent, inflatable, surface, chamber, infringement, upper, matter of law, literal, summary judgment, cover sheet, air flow, removable, secondary, patient, moving party, estoppel, nonmoving party, air bed, therapeutic, air-permeable, engineering, continuous, infringe, disputed, skill, surface area, operably, concedes


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[Civil Procedure](#) > [Summary Judgment](#) > [Burdens of Production & Proof](#) 

[Civil Procedure](#) > [Summary Judgment](#) > [Summary Judgment Standard](#) 


**HN1** Summary judgment is appropriate if the pleadings,  depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. Once the moving party meets its burden, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. A genuine factual dispute requires more than a mere scintilla of evidence. [More Like This Headnote](#)

[Civil Procedure](#) > [Summary Judgment](#) > [Summary Judgment Standard](#) 


**HN2** In considering a summary judgment motion the court must  view the evidence in the light most favorable to the nonmoving party. Summary judgment may be granted, however, if the nonmoving party's evidence is merely colorable or is not significantly probative. Thus, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, summary judgment in favor of the moving party is proper. [More Like This Headnote](#)

[Patent Law](#) > [Infringement](#) > [Acts of Infringement](#) 


**HN3** Literal infringement of a claim exists when every limitation recited in the claim is found in the accused device, i.e., when the properly construed claim reads on the accused device exactly. [More Like This Headnote](#)

[Patent Law](#) > [Infringement](#) > [Doctrine of Equivalents](#) 


**HN4** An accused device that does not literally infringe a patent claim may infringe under the doctrine of equivalents if it performs substantially the same function in substantially the same way to obtain the same result. [More Like This Headnote](#)

[Patent Law](#) > [Infringement](#) > [Doctrine of Equivalents](#) 


**HN5** Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole. It is important to ensure that the application of the doctrine, even as to an individual element, is not allowed such broad play as to effectively eliminate that element in its entirety. [More Like This Headnote](#)


[Patent Law](#) > [Infringement](#) > [Doctrine of Equivalents](#) 

**HN6** The essential inquiry is: Does the accused product or process contain elements identical or equivalent to each claimed element of the patented invention? [More Like This Headnote](#)

[Patent Law](#) > [Infringement](#) > [Prosecution History Estoppel](#) 

**HN7** The essence of prosecution history estoppel is that a patentee should not be able to obtain, through litigation, coverage of subject matter relinquished during prosecution. Amendments made to overcome a prior art rejection can create an estoppel. In other words, a patentee may not reassert as an equivalent element something given up during the patent application process to overcome the prior art. [More Like This Headnote](#)

[Patent Law](#) > [Infringement](#) > [Doctrine of Equivalents](#) 

[Patent Law](#) > [Infringement](#) > [Prosecution History Estoppel](#) 

**HN8** Where the reason for a change was not related to avoiding the prior art, the change may introduce a new element, but it does not necessarily preclude infringement by equivalents of that element. But the patent holder bears the burden of establishing the reason for an amendment that was not required to distinguish prior art. [More Like This Headnote](#)

**COUNSEL:** For KCJ CORPORATION, plaintiff: Terry W. Schackmann, Therese M. Schuele, Michael F. Saunders, Teresa A. Woody, Spencer, Fane, Britt & Browne, Kansas City, MO.

For KCJ CORPORATION, plaintiff: Stacy Y Daniels, Spencer, Fane, Britt & Browne, Overland Park, KS.

For KINETIC CONCEPTS INC, KCI THERAPEUTIC SERVICES, INC., defendants: Lawrence A. Rouse, Marcus N. Bozeman, Vivian W. McLeod, Rouse, Hendricks, German, May & Shank, Kansas City, MO.

For DON P LOVETERE, movant: Lawrence A. Rouse, Marcus N. Bozeman, Vivian W. McLeod, Rouse, Hendricks, German, May & Shank, Kansas City, MO.

**JUDGES:** Kathryn H. Vratil, United States District Judge.

**OPINIONBY:** Kathryn H. Vratil

**OPINION: [\*1287] MEMORANDUM AND ORDER**

**KCJ Corporation** filed suit against **Kinetic Concepts, Inc.** and **KCI Therapeutic Services, Inc.**, asserting that they willfully **[\*\*2]** infringed its U.S. Patent No. 4,631,767 (the "767 patent") by manufacturing and selling certain therapeutic low air loss mattresses. This matter comes before the Court on Plaintiff KCJ's Motion For Summary Judgment As To Infringement (Doc. # 225) and Defendants' Motion [For Partial Claim Construction And] For Summary Judgment Based On That Construction (Doc. # 231), both filed October 21, 1998. For the reasons stated below the Court finds that defendants' motion for summary judgment should be sustained and that plaintiff's motion should be overruled.

**Summary Judgment Standards**

**HN1** Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, **[\*\*3]** 106 S. Ct. 2548 (1986). Once the moving party meets its burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. A "genuine" factual dispute requires more than

a mere scintilla of evidence. Id. at 252.

**HN2** In considering a summary judgment motion the Court must view the evidence in the light most favorable to the nonmoving party. Tom v. First Am. Credit Union, 151 F.3d 1289, 1291 (10th Cir. 1998). Summary judgment may be granted, however, if the nonmoving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51. Thus, "'where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,' summary judgment in favor of the moving party is proper." Thomas v. IBM, 48 F.3d 478, 484 (10th Cir. 1995) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)).

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### **[\*1288] Factual Background**

On December 22, 1998, the Court entered a Memorandum and Order (Doc. # 279) which construed Claim 1 and set forth background facts concerning the **[\*\*4]** patent application and prosecution history. The Court does not repeat its claim construction or factual recitation but incorporates them by reference.

First addressing defendants' motion for summary judgment, the Court finds that the following facts are either uncontroverted or, if controverted, set forth in the light most favorable to plaintiff.

#### **I. Claim Construction**

On December 17, 1998, this Court held a Markman hearing and the parties presented argument and evidence concerning the proper construction of disputed terms in Claim 1 of the '767 patent. After considering the evidence produced at that hearing, the Court held that all of the disputed terms had a plain meaning in light of the '767 claims, the '767 specification, and the '767 prosecution history, and it then construed the disputed terms as a matter of law. The Court first addressed Clause (a), which claims "means defining a lower, continuous, inflatable chamber having an air-permeable, flexible upper wall portion." The Court determined that "[a] person of ordinary skill in the art of air bed engineering would read the phrase 'continuous' to mean without interruption and the word 'a' to mean one." The Court **[\*\*5]** therefore determined as a matter of law that the phrase "a lower, continuous, inflatable chamber" claims one non-interrupted inflatable chamber. Memorandum and Order (Doc. # 279) at 8, 10-11.

The Court next addressed Clause (b), which claims that the upper wall portion is "constructed for substantially uniform airflow therethrough over substantially the entire plan surface area of said upper wall portion," and

Clause (d), which claims that the secondary wall means is "constructed for substantially uniform passage of air therethrough over substantially the entire plan surface area of said secondary wall means." The Court held as a matter of law that "[a] person of ordinary skill in the art of air bed engineering would read 'substantially uniform airflow' to mean airflow that does not substantially fluctuate over time." The Court therefore concluded that "when added to the words 'over substantially the entire plan surface,' the claim requires that air flow at substantially the same rate at substantially all locations on the surface." Id. at 11, 13.

Finally, the Court construed Clause (c), which claims "air-permeable secondary wall means above said chamber upper wall portion **[\*\*6]** and operably coupled with said chamber-defining means." The Court held that "[a] person of ordinary skill in the art of air bed engineering would read 'operably coupled' to mean that two elements work in concert to create an inflatable chamber, e.g. one which is not air tight but can receive and hold air." Therefore the Court concluded that "whatever means is used to operably couple must create an inflatable chamber between the top wall and the secondary wall." Id. at 13, 15.

## II. Defendants' Accused Devices

Kinetic Concepts, Inc. ("Kinetics") is a Texas corporation with its principal place of business in San Antonio, Texas. KCI Therapeutic Services, Inc. ("Therapeutic"), a Delaware corporation, is a wholly owned subsidiary of Kinetics which also has its principal place of business in San Antonio, Texas. At all relevant times, Therapeutic has been engaged in the business of marketing and distributing products made by or at the direction of Kinetics. Kinetics makes, offers for sale, rents and/or sells various low air loss mattresses: First Step, First Step Plus, First Step Select, First Step MRS, First Step Tri-Cell, First Step Advantage, and Home Kair DMS II. These mattresses **[\*\*7]** -- the accused devices -- are patient support devices that are designed to prevent skin breakdown by reducing the interface pressure between the **[\*1289]** skin of a bedridden patient and the surface of the support device. n1

----- Footnotes -----

n1 Kinetics released the various products at different times: First Step and First Step MRS in 1989, First Step Plus in 1990, First Step Select in 1993, First Step Tri-Cell and Home Kair DMS II in 1995, and First Step Advantage in 1998. Plaintiff did not know that defendants had manufactured or marketed the accused devices until Ms. Carr saw some of them at a trade show in 1994. In 1996, Ms. Carr obtained and tested one of the products. These dates are relevant only to the laches defense,

which the Court does not reach because of its finding that defendants are entitled to summary judgment on other grounds.

----- End Footnotes-----

Each of the accused devices includes an inflatable mattress, an air supply unit, and a removable cover sheet. Each inflatable mattress is a one-piece unit which consists of three separately inflatable **[\*\*8]** sections that correspond to the head, body, and legs of the patient. None of the sections have chambers which are interdigitated.

Except on the First Step device, each of the three sections incorporates at least one panel of high air loss (HAL) Gore-Tex, an air-permeable fabric, on the top (patient support surface) of the mattress. On the First Step, this surface has stitched retainers which permit air to permeate the surface.

When defendants' devices are used in accordance with operating instructions provided by Kinetics, a removable cover sheet of HAL Gore-Tex covers the entire patient support surface of each mattress. The cover sheets are to be attached to the mattress by straps, Velcro strips, elastic bands, or normal hospital bed tucking.

Each of defendants' devices is inflated by a blower unit which maintains positive air pressure throughout the entire mattress by continuously blowing air into each section. Air flows from the mattress, through the HAL Gore-Tex panels in the upper wall of the mattress (in the case of the First Step, through the stitched retainers), and creates positive air pressure in the compartment between the inflatable mattress and the removable cover sheet, **[\*\*9]** thus inflating the compartment between the inflatable mattress and the removable cover sheet. In each of the accused devices, air then flows through the removable mattress cover sheet.

## ANALYSIS

### I. Literal Infringement

**HN3** Literal infringement of a claim exists when every limitation recited in the claim is found in the accused device, i.e., when the properly construed claim reads on the accused device exactly." Engel Indus., Inc. v. Lockformer Co., 96 F.3d 1398, 1405 (Fed Cir. 1996). In this case, the Court's construction of Clause (a) and Clause (b) of Claim 1 prevents a finding of literal infringement as a matter of law. n2 Further, because Claims 2, 3, and 4 are dependent on Claim 1, literal infringement of those claims is also impossible. n3

----- Footnotes -----

n2 The Court construed Clause (a) of Claim 1 as claiming "one non-interrupted inflatable chamber." Memorandum and Order (Doc. # 279) at 11. The accused devices are one-piece units with three separate inflatable chambers. Thus Clause (a) of Claim 1 does not read directly on the accused devices. Also under the Court's construction, Clause (b) of Claim 1 requires "air flow at substantially the same rate at substantially all locations on the surface." The upper walls of the accused devices contain large portions of low air loss fabric, with insets of high air loss fabric.

Plaintiff concedes that the limitations of Clause (a) and Clause (b) are not met by any of the accused devices. Plaintiff argues that the Court's construction would allow a finding of literal infringement, however, as to Clause (c) and Clause (d). Because a finding of literal infringement is precluded by application of the claim construction as to Clause (a) and Clause (b), the Court need not address that argument. **[\*\*10]**

n3 Plaintiff contends that the Court's construction is erroneous but concedes that under that construction, it cannot prove literal infringement of Claim 1.

----- End Footnotes -----

Defendants are entitled to summary judgment on plaintiff's claim that they literally infringed Claim 1 of the '767 patent.

**[\*1290]** II. Doctrine of Equivalents

**HN4** ¶ An accused device that does not literally infringe a patent claim may infringe under the doctrine of equivalents if "it performs substantially the same function in substantially the same way to obtain the same result." Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 608, 94 L. Ed. 1097, 70 S. Ct. 854 (1950) (further quotations and citations omitted). The Supreme Court recently clarified this doctrine, stating that

**HN5** ¶

Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole. It is important to

ensure that the application of the doctrine, even as to an individual element, is not allowed such **[\*\*11]** broad play as to effectively eliminate that element in its entirety.

Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 117 S. Ct. 1040, 1049, 137 L. Ed. 2d 146 (1997). **HN6** The essential inquiry is "Does the accused product or process contain elements identical or equivalent to each claimed element of the patented invention?" Id. 117 S. Ct. at 1054.

Defendants contend that under principles of prosecution history estoppel, plaintiff cannot assert a scope of protection of the '767 patent that would encompass defendants' accused products. Prosecution history estoppel is a legal question for the Court. Insituform Techs., Inc. v. Cat Contracting Co., 99 F.3d 1098, 1107 (Fed. Cir. 1996). **HN7** The essence of prosecution history estoppel is that a patentee should not be able to obtain, through litigation, coverage of subject matter relinquished during prosecution." Haynes Int'l, Inc. v. Jessop Steel Co., 8 F.3d 1573, 1577 (Fed. Cir. 1993), *clarified on reh'g*, 15 F.3d 1076 (1994); see also Desper Prods., Inc. v. Qsound Labs, Inc., 157 F.3d 1325, 1338 (Fed. Cir. 1998) ("Amendments made to overcome a prior art rejection can create . . . an estoppel."). In other words, **[\*\*12]** a patentee may not reassert as an equivalent element something given up during the patent application process to overcome the prior art.

Plaintiff asserts that defendants' accused devices contain an equivalent of each element of Claim 1, in that they perform substantially the same function in substantially the same way to achieve substantially the same result as the device claimed in the '767 patent. Plaintiff acknowledges, however, that it added Clause (b) and Clause (d) to Claim 1 in response to prior art which the patent examiner cited. Plaintiff disagrees with the Court's conclusion that plaintiff distinguished the prior art on the basis of where air flows (i.e., over substantially the entire surface). Rather, plaintiff cites intrinsic evidence that it added the limitation in Clause (b) and Clause (d) to define how air flows from the upper and secondary walls.

Plaintiff cites Hilton Davis for the rule that **HN8** where the reason for [a] change was not related to avoiding the prior art, the change may introduce a new element, but it does not necessarily preclude infringement by equivalents of that element." 117 S. Ct. at 1051. But the patent holder bears the burden of establishing **[\*\*13]** the reason for an amendment that was not required to distinguish prior art. See *id.* Plaintiff concedes that it cannot meet this burden because it "does not agree with the Court's interpretation of these claim elements, or that such a non-responsive

surplus limitation was added." Plaintiff KCJ's Reply To Defendants' Memorandum In Response To Plaintiff's Motion For Summary Judgement Of Infringement (Doc. # 282) filed January 5, 1999, at p. 12.

The Court finds that based on its claim construction and its examination of the file history in connection with that claim construction, plaintiff is estopped from asserting that the accused products -- which do not include air flow at substantially the same rate at substantially all locations on [\*1291] the upper walls -- infringe Claim 1 under the doctrine of equivalents. The Schild '009 patent and the Gammons '633 patent claimed mattresses which did allow air to flow through discrete apertures or perforations but did not permit uniform air flow over substantially the entire surface area. The prosecution history reveals that plaintiffs' amended patent application distinguished this prior art on the basis of where air flows (i.e., over substantially [\*\*14] the entire surface). As a result of this amendment, the patent office issued the '767 patent and plaintiff cannot now reclaim mattresses which do not permit air flow at substantially the same rate at substantially all locations on the surface. Therefore, as a matter of law, plaintiff cannot establish infringement under the doctrine of equivalents.

IT IS THEREFORE ORDERED that Defendants' Motion [For Partial Claim Construction And] For Summary Judgment Based On That Construction (Doc. # 231) filed October 21, 1998, be and hereby is SUSTAINED.

IT IS FURTHER ORDERED that Plaintiff KCJ's Motion For Summary Judgment As To Infringement (Doc. # 225) filed October 21, 1998, be and hereby is OVERRULED.

IT IS FURTHER ORDERED that Defendant's Motion For Partial Summary Judgment (Doc. # 222) filed October 21, 1998, be and hereby is OVERRULED as moot.

IT IS FURTHER ORDERED that all pending motions in limine (Docs. # 268, 269, 270, 271, 272, 273, 274 and 277) be and hereby are OVERRULED as moot.

Dated this 13th day of January, 1999, at Kansas City, Kansas.

Kathryn H. Vratil

United States District Judge






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TOC: [United States Code Service - Titles 1 through 50 > /.../ > CHAPTER 28. INFRINGEMENT OF PATENTS > § 271. Infringement of patent](#)

35 USCS § 271

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\*\*\* CURRENT THROUGH P.L. 108-204, APPROVED 3/02/04 \*\*\*  
\*\*\* WITH A GAP OF 108-203 \*\*\*

TITLE 35. PATENTS  
PART III. PATENTS AND PROTECTION OF PATENT RIGHTS  
CHAPTER 28. INFRINGEMENT OF PATENTS

♦ GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

35 USCS § 271 (2004)

- ♦ Review expert commentary from The National Institute for Trial Advocacy

§ 271. Infringement of patent

(a) Except as otherwise provided in this title [35 USCS §§ 1 et seq.], whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement; (4) refused to license or use any rights to the patent; or (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

(e)

(1) It shall not be an act of infringement to make, use, offer to sell, or sell within the

## 79. Miscellaneous

"Invention," was what applicant had discovered as shown by his own disclosure thereof in specifications and drawings of his application, and he had right to whole of that disclosure, but could have appropriated less if he had desired so to do; his desires were measured by his claims. Hartford-Empire Co. v Obear-Nester Glass Co. (1934, CA8 Mo) 71 F2d 539, cert den (1934) 293 US 625, 79 L Ed 712, 55 S Ct 345.

Using plaintiff's designations for proprietary seed corn wrongfully acquired from plaintiff without crediting plaintiff as source is properly held to infringe on plaintiff's rights. Pioneer Hi-Bred Int'l v Holden Found. Seeds (1994, CA8 Iowa) 35 F3d 1226, 31 USPQ2d 1385, 39 Fed Rules Evid Serv 993.

Patent claims on forefoot enveloping slipper sock within shoe are properly held not to be infringed by shoe having inner sleeve that does not envelope forefoot, especially considering that function of allowing foot to move within shoe is not permitted by accused shoe. Wolverine World Wide v Nike, Inc. (1994, CA FC) 38 F3d 1192, 32 USPQ2d 1338, reh, en banc, den (1994, CA FC) 1994 US App LEXIS 33181.

District court erroneously construed claims on selectively activated emitters as not covering strobed printing, so that judgment is reversed and jury verdict of infringement by strobed printing over variable intervals is reinstated. Laitram Corp. v NEC Corp. (1995, CA FC) 62 F3d 1388, 36 USPQ2d 1206.

Trial judge has duty to interpret meaning of claims for jury, and trial judge erred in adopting claim meaning proposed by party, so that claims are interpreted on appeal to find that infringement is not possible under existing evidence, resulting in reversal of judgment for patentee. Exxon Chem. Patents v Lubrizol Corp. (1995, CA FC) 64 F3d 1553, 35 USPQ2d 1801, reh, en banc, den (1996, CA FC) 77 F3d 450, 37 USPQ2d 1767 and cert den (1996) 518 US 1020, 135 L Ed 2d 1073, 116 S Ct 2554 and vacated on other grounds, remanded (1998, CA FC) 137 F3d 1475, 45 USPQ2d 1865, reh, en banc, den (1998, CA FC) 1998 US App LEXIS 9291 and cert den (1998) 525 US 877, 142 L Ed 2d 148, 119 S Ct 181.

Stability of macroreticulated cation exchange resin in organic medium depends on less than 50 percent dimension change, and dimension is construed as linear to encompass preferred embodiment of patent, rather than three dimensional volume as urged by defendant, so that judgment of infringement is affirmed. Hoechst Celanese Corp. v BP Chems. Ltd. (1996, CA FC) 78 F3d 1575, 38 USPQ2d 1126, cert den (1996) 519 US 911, 136 L Ed 2d 198, 117 S Ct 275.

Claims on placement of pairing tabs in shoes distinguish tabs from shoe liners, so that defendant's placement of tabs in shoe liners does not infringe and judgment to contrary is reversed. Maxwell v J. Baker, Inc. (1996, CA FC) 86 F3d 1098, 39 USPQ2d 1001, reh, en banc, den (1996, CA FC) 1996 US App LEXIS 23200 and cert den (1997) 520 US 1115, 137 L Ed 2d 327, 117 S Ct 1244.

Prosecution history shows that claim limitation of no plastic flow of trap adhesive below 1200F requires both vertical and horizontal testing of adhesive at 1200F, so that infringement and commercial success decisions based on less rigorous tests are respectively reversed and vacated. J.T. Eaton & Co. v Atlantic Paste & Glue Co. (1997, CA FC) 106 F3d 1563, 41 USPQ2d 1641.

Dental tool with gear head lacking claimed recess is properly held not to infringe, so that judgment to that effect is affirmed. Young Dental Mfg. Co. v Q3 Special Prods. (1997, CA FC) 112 F3d 1137, 42 USPQ2d 1589, 37 FR Serv 3d 861, reh, en banc, den (1997, CA FC) 1997 US App LEXIS 17572.

Claims on single chamber plasma sterilizer for medical equipment are not infringed by sterilizer using two separate chambers, so that judgment to this effect is affirmed. AbTox Inc. v Exitron Corp. (1997, CA FC) 122 F3d 1019, 43 USPQ2d 1545, 46 USPQ2d 1735, reh den (1997, CA FC) 1997 US App LEXIS 31643 and amd, on reh (1997, CA FC) 131 F3d 1009.

Since claim interpretation is matter of law for court and since district court properly construed claims on liquid dispenser relative to argument made in distinguishing cited art, judgment for patentee of infringement is affirmed. Cybor Corp. v FAS Techs. (1998, CA FC) 138 F3d 1448, 46 USPQ2d 1169.

District court erred in adopting jury's finding of infringement of claim of plaintiff's bottom sheet feeder patent, since hypothetical claim proposed by plaintiff as aid in determining whether claim at issue may be infringed under doctrine of equivalents impermissibly narrowed important gate member limitation and would not have been patentable over previously cited prior art. Streamfeeder, L.L.C. v Sure-Feed Sys., Inc. (1999, CA FC) 175 F3d 974, 50 USPQ2d 1515.

**When claim language or context suggest ambiguity in application of general meaning of article (word), court undertakes examination of written description and prosecution history to ascertain whether to limit meaning of "a" or "an."** KCJ Corp. v Kinetic Concepts, Inc. (2000, CA FC) 223 F3d 1351, 55 USPQ2d 1835.

Every patent claim is construed in context of specification in which it appears as part of patent document, and when claim is copied from another patent for interference purposes, it must be supported by specification of copier. Cultor Corp. v A.E. Staley Mfg. Co. (2000, CA FC) 224 F3d 1328, 56 USPQ2d 1208, reh, en banc, den (2000, CA FC) 2000 US App LEXIS 29602.

**35 USCS § 271**  
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79. Miscellaneous (continued)

Evidence showing that defendant worked in co-operation with others to infringe patented method of grouting offshore oil rigs shows both singular and joint infringement. Shields v Halliburton Co. (1980, WD La) 493 F Supp 1376, 207 USPQ 304, affd (1982, CA5 La) 667 F2d 1232, 216 USPQ 1066.

Since patentee of entry control system involving door locks has not shown direct infringement by users of defendant's entry control system, which does not include door locks, defendant is not shown to be contributory infringer. Trell v Marlee Electronics Corp. (1987, CD Cal) 5 USPQ2d 1501, revd without op (1989, CA) 867 F2d 615, 10 USPQ2d 1790, reh den (1989, CA FC) 1989 US App LEXIS 4151.

Detector patent claim requiring light beams to be spaced apart is not infringed by accused device using light beams that intersect. Carroll Touch, Inc. v Electro Mechanical Sys. (1992, CD Ill) 24 USPQ2d 1349, affd in part and vacated in part on other grounds (1993, CA FC) 15 F3d 1573, 27 USPQ2d 1836.

Orthopedic screw lacking drill tip as claimed and requiring separate drill for pilot hole deserves summary judgment of noninfringement. McGuire v Acufex Microsurgical (1994, DC Mass) 34 USPQ2d 1749, accepted, summary judgment den, in part, summary judgment gr, in part (1994, DC Mass) 1994 US Dist LEXIS 17676, ops combined at (1994, DC Mass) 868 F Supp 388.

Claims on microwave package susceptor serving as wrapper for browning and crisping are not infringed by microwave popcorn package having susceptor not serving as wrapper and not browning or crisping food. General Mills v Hunt-Wesson, Inc. (1996, DC Minn) 917 F Supp 663, 41 USPQ2d 1420, affd (1997, CA FC) 103 F3d 978, 41 USPQ2d 1440, dismd (1997, CA FC) 1997 US App LEXIS 21708.

Patent claim not anticipated by prior art requires hole in marine drive shaft seal assembly that is not infringed by groove in accused assembly, so that summary judgment is granted to defendant. Finney v Nautical Specialties (1997, ND Ill) 45 USPQ2d 1377.

Claim requiring cover interposed between flange and back wall of mounting bracket is not equivalently infringed by bracket lacking interposed cover, so that summary judgment is granted to defendant. Mid-America Bldg. Prods. Corp. v Richwood Bldg. Prods. (1997, ED Mich) 970 F Supp 612, 44 USPQ2d 1207, subsequent app (1998, CA FC) 1998 US App LEXIS 6159.

Accused deep fat fryer lacking claimed hot air flow channels proceeding in alternating right and left turns from one wall to an opposite wall is summarily adjudged not to infringe. C.P. Partnership v Far West Prods. (1998, WD La) 49 USPQ2d 1734.

Configurational limitations involving sacrificial anode built into link of mooring chain to inhibit rusting in sea water are not incorporated into chain link used by Navy so that judgment for defendant for noninfringement is granted. Timmington v United States (1993) 29 Fed Cl 731, 31 USPQ2d 1265, dismd without op (1994, CA FC) 22 F3d 1105 and affd without op (1994, CA FC) 31 F3d 1177.

Claims on intraocular lens having continuous curving common edge are drawn to three piece lens and are not infringed by accused one piece lens that lacks edge between optic and haptic prptions, so that summary judgment is granted to defendant. Powell v Storz Ophthalmics (1994, MD Fla) 34 USPQ2d 1136.

Signal: Caution: Possible negative treatment  
Trail: **Unrestricted**

*KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 2000 U.S. App. LEXIS 20963, 55 U.S.P.Q.2d (BNA)-1835 (Fed. Cir. 2000)

**SHEPARD'S SUMMARY ♦ Hide Summary**

**Shepard's FULL Summary:** **Caution** - Possible negative treatment

No subsequent appellate history. Prior history available.

**Citing References:**

Cautionary Analyses: **Distinguished (2)**  
Positive Analyses: **Followed (8)**  
Neutral Analyses: **Dissenting Op. (1)**  
Other Sources: **Law Reviews (4), Statutes (1), Treatises (23)**

**PRIOR HISTORY ( 3 citing references ) ♦ Hide Prior History**

Select for Delivery

- ☐ 1. *KCJ Corp. v. Kinetic Concepts, Inc.*, 18 F. Supp. 2d 1212, 1998 U.S. Dist. LEXIS 13808 (D. Kan. 1998)
- ☐ 2. **Later proceeding at:**  
*KCJ Corp. v. Kinetic Concepts, Inc.*, 30 F. Supp. 2d 1319, 1998 U.S. Dist. LEXIS 20508 (D. Kan. 1998)
- ☐ 3. **Summary judgment granted by, Motion overruled by:**  
*KCJ Corp. v. Kinetic Concepts, Inc.*, 39 F. Supp. 2d 1286, 1999 U.S. Dist. LEXIS 3125 (D. Kan. 1999)

**Affirmed by (CITATION YOU ENTERED):**

*KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 2000 U.S. App. LEXIS 20963, 55 U.S.P.Q.2d (BNA) 1835 (Fed. Cir. 2000)

**CITING DECISIONS ( 52 citing decisions )****1ST CIRCUIT - U.S. DISTRICT COURTS**

- ☐ 4. **Cited by:**  
*Les Traitments Des Eaux Poseidon v. Kwi, Inc.*, 135 F. Supp. 2d 126, 2001 U.S. Dist. LEXIS 4587 (D. Mass. 2001)   
  
135 F. Supp. 2d 126 p.132  
135 F. Supp. 2d 126 p.137

**2ND CIRCUIT - U.S. DISTRICT COURTS**

- ☐ 5. **Distinguished by:**  
*A&E Prods. Group, L.P. v. Mainetti USA Inc.*, 2004 U.S. Dist. LEXIS 975 (S.D.N.Y.

Jan. 26, 2004) **A**

2004 U.S. Dist. LEXIS 975

☐ **6. Cited by:**

ConMed Corp. v. Ludlow Corp., 235 F. Supp. 2d 109, 2002 U.S. Dist. LEXIS 24460 (N.D.N.Y. 2002) **A**

235 F. Supp. 2d 109 p.118

☐ **7. Cited by:**

Astra Aktiebolag v. Andrx Pharms., Inc. (In re Omeprazole Patent Litig.), 222 F. Supp. 2d 423, 2002 U.S. Dist. LEXIS 19960 (S.D.N.Y. 2002) **A**

222 F. Supp. 2d 423 p.505

☐ **8. Cited by:**

Jackrel v. Paragon Sporting Goods, 171 F. Supp. 2d 163, 2001 U.S. Dist. LEXIS 5214 (S.D.N.Y. 2001)

171 F. Supp. 2d 163 p.172

**3RD CIRCUIT - U.S. DISTRICT COURTS**

☐ **9. Cited by:**

Mylan Pharms., Inc. v. Kremers Urban Dev. Co., 2004 U.S. Dist. LEXIS 391 (D. Del. Jan. 13, 2004) **A**

2004 U.S. Dist. LEXIS 391

☐ **10. Cited by:**

Stambler v. RSA Sec., Inc., 2003 U.S. Dist. LEXIS 20998 (D. Del. Nov. 14, 2003) **A**

2003 U.S. Dist. LEXIS 20998

☐ **11. Cited by:**

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
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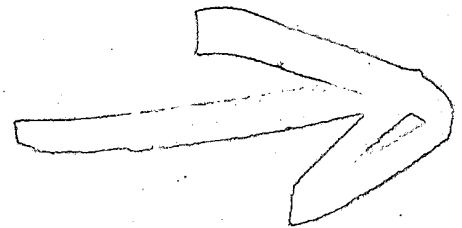
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